Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

PETE WILSON, GOVERNOR OF THE STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

CABAZON BAND OF MISSION INDIANS, SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Did the district court have jurisdiction to compel California to tax its horse racing industry for the windfall economic benefit of respondent Tribes?

2. Does IGRA'S "primary beneficiary" policy preclude California from collecting its statutory license fee from the horse racing industry based on wagers placed at tribal simulcast wagering sites, where the fee is collected in a nondiscriminatory manner from all simulcast wagering facilities, the burden of the fee has been determined conclusively to fall entirely on the horse racing industry, and the Tribes have agreed that the horse racing industry shall be the primary beneficiary of off-track wagering activities that take place on their Indian lands?

3. Does the Tenth Amendment forbid the district court from commandeering California's taxing authority to divert nondiscriminatory license fee revenues collected by the State from the racing industry to respondent Tribes, where collection of the license fee has been determined not to burden tribal operations?

4. Does IGRA, 25 U.S.C. § 2710(d)(7)(A)(ii), afford California a remedy to enjoin the operation of slot machines and the conduct of other forms of casino gambling by respondent Tribes, where the Tribes have a compact with the State of California that authorizes only the conduct of an off-track wagering operation but does not expressly forbid the conduct of other class III gaming activities?

LISTING OF PARTIES TO THE PROCEEDINGS

Cabazon Band of Mission Indians
Sycuan Band of Mission Indians
Barona Band of Mission Indians
Viejas Band of Mission Indians
Southern California
Off-Track Wagering, Inc. (SCOTWINC)
Del Mar Thoroughbred Club
Hollywood Park, Inc.
Los Angeles Turf Club
Oak Tree Racing Association
Los Alamitos Race Course
Los Angeles County Fair

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LISTING OF PARTIES TO THE PROCEEDINGS ii

CITATIONS TO DECISIONS BELOW 1

STATEMENT OF THIS COURT'S JURISDICTION ... 1

RELEVANT STATUTES 1

STATEMENT OF THE CASE 2

A. Jurisdiction of the District Court 2

B. Summary of Relevant Facts 3

1. The California Horse Racing Law 3

2. The Underlying Tribal-state Compact Negotiations 5

3. *Cabazon I* and *Cabazon II* 7

4. Proceedings on Remand and *Cabazon III* .. 11

REASONS FOR ISSUING WRIT 13

A. The Writ Should Issue Because the Ninth Circuit Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, and Has Sanctioned Such a Departure by the District Court, as to Call for an Exercise of this Court's Supervisory Power 13

1. The Writ Should Issue Because the District Court Was Without Jurisdiction over the claims for surrender of state tax revenues 13

TABLE OF CONTENTS – Continued

Page

2. The Writ Should Issue Because the Lower Courts Cannot Come to a Consistent Position Respecting the Application of IGRA's "Primary Beneficiary" Policy to the Facts of this Case 16

B. The Writ Should Issue to Determine Whether the Tenth Amendment Forbids the District Court from Commandeering the State's Taxing Authority for the Windfall Economic Benefit of the Tribes 19

C. The Writ Should Issue to Determine Whether Tribal-state Compacts Include an Implied Covenant Not to Engage in Uncompacted Class III Gaming That Is Enforceable under IGRA, 25 U.S.C. § 2710(d)(7)(A)(ii) 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Arizonans for Official English v. Arizona, ___ U.S. ___, 117 S.Ct. 1055 (1997) 13

Bruner v. United States, 343 U.S. 112 (1952) 13

Cabazon Band of Mission Indians, et al. v. State of California, 788 F.Supp. 1513 (E.D. Cal. 1992) 1, 6, 7, 8, 15, 23

Cabazon Band of Mission Indians, et al. v. Wilson, 124 F.3d 1050 (9th Cir. 1997) 1, 17, 18, 20, 24

Cabazon Band of Mission Indians, et al. v. Wilson, 23 F.3d 1535 (9th Cir. 1994) 1

Cabazon Band of Mission Indians, et al. v. Wilson, 37 F.3d 430 (9th Cir. 1994) ..... *passim*

Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945) 15

Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990) 7

New York v. United States, 505 U.S. 144 (1992) 20

Pfingst v. Sycuan Band of Mission Indians, ___ U.S. ___, 116 S.Ct. 297 (1995) 22

Printz v. United States, ___ U.S. ___, 117 S.Ct. 2365 (1997) 20

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 14

BLE OF AUTHORITIES – Continued

TA Page

d of Mission Indians v. Roache, 54 F.3d
Sycuan Ban Cir. 1995) 22
535 (9th
ntain Apache v. Bracker, 448 U.S. 136
White Mou 9
(1980) ..
ık v. Lackner, 448 F.Supp. 4 (N.D. Cal.
Yuan Jen C 15
1977) ....
NAL PROVISIONS
CONSTITUTIO
Federal es Constitution
United Sta endment 20
Tenth Ar Amendment 7, 11, 15
Eleventh

State Constitution
California I § 5 15
Article I III, § 31 16
Article X VI, § 6 16
Article X

STATUTES States Code
25 United 1
§ 1254.. seq. 2, 5
§ 2701 et 1, 9
§ 2702(2) (1)(C) 21
§ 2710(d

TABLE OF AUTHORITIES – Continued

Page

§ 2710(d)(6) 21

§ 2710(d)(7)(A)(i) 6

§ 2710(d)(7)(A)(ii) 20, 21, 22

28 United States Code

§ 1331 2

§ 1362 2

§ 2202 12

California Business and Profession Code

§ 10605.3 4

§ 19400 3

§ 19605 3

§ 19605.1 3

§ 19605.2 3

§ 19605.7 ..... 4, 5

§ 19605.7(a) 5

§ 19608.2 4

§ 19608.2(b)(2) 4

§ 19608.2(e)(1) 4

TABLE OF AUTHORITIES – Continued

Page

§ 19608.9(b) 5

§ 19610 4

CITATIONS TO DECISIONS BELOW

1. *Cabazon Band of Mission Indians, et al. v. State of California*, 788 F.Supp. 1513 (E.D. Cal. 1992) (hereafter, *Cabazon I*). App. 80.

2. *Cabazon Band of Mission Indians, et al. v. Wilson*, 23 F.3d 1535 (9th Cir. 1994) (*vacated on rehearing*). App. 1.

3. *Cabazon Band of Mission Indians et al. v. Wilson*, 37 F.3d 430 (9th Cir. 1994) (hereafter, *Cabazon Band II*).

4. *Cabazon Band of Mission Indians, et al. v. Wilson*, 124 F.3d 1050 (9th Cir. 1997) (hereafter, *Cabazon Band III*). App. 46.

STATEMENT OF THIS COURT'S JURISDICTION

The Ninth Circuit filed its decision on September 2, 1997. The State's petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected by the Court of Appeals on January 14, 1998. On January 28, 1998, the Court of Appeals stayed issuance of its mandate for 60 days to permit the filing of this Petition. This Court has jurisdiction pursuant to 25 U.S.C. § 1254.

RELEVANT STATUTES

Section 3 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2702, 102 Stats. 2467, provides in pertinent part as follows:

> The purpose of this chapter is –
>
> (1) to provide for a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, **to ensure that the Indian tribe is the primary beneficiary of the gaming operation**, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
>
> (3) . . . .

The statute is relied upon by the Ninth Circuit as a statement of IGRA's "primary beneficiary" policy. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994), but is incorrectly cited therein as 25 U.S.C. § 2701(2). *See* App. 106.

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

Plaintiff Tribes initially sought a declaration whether the State's collection of a license fee from wagers placed at a tribal off-track betting facility is permissible under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.* Jurisdiction was grounded on 28 U.S.C. §§ 1331 and 1362. *Cabazon I*, 788 F.Supp. 1513 (App. 80). The State consented to suit for purposes of this declaratory judgment. App. 13 n. 2. On remand from the decision

of the Court of Appeals in *Cabazon II*, the plaintiff Tribes sought enforcement of alleged contractual obligations incorporated into the subject tribal-state compacts. Jurisdiction to enforce those alleged contractual obligations was not grounded on any statute, but was implied from Congress' requirement that tribes and states negotiate compacts for the regulation of class III gaming. App. 15. The State disputes the district court's jurisdiction to entertain the Tribes' contract enforcement action.

B. Summary of Relevant Facts

1. The California Horse Racing Law

California has a comprehensive system for the regulation of horse racing and wagering on horse racing, including off-track wagering, sometimes called "satellite wagering." Cal. Bus. & Prof. Code § 19400 *et seq.* Satellite wagering facilities are sometimes known as "simulcast facilities" or, when operated other than at a race track, "off-track betting" sites or facilities.

Under the California Horse Racing Law, the Horse Racing Board may authorize "racing associations" (*i.e.*, race tracks) or county fairs to operate off-track betting facilities. *See* Cal. Bus. & Prof. Code §§ 19605, 19605.1, 19605.2. The racing associations contract with an organization of racing associations, in this case known as SCOTWINC,[1] for the broadcast of the live race into

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[1] The acronym stands for Southern California Off-Track Wagering, Inc.

authorized simulcast wagering sites and for administering the wagering at off-track betting sites. Cal. Bus. & Prof. Code §§ 10605.3, 19608.2. By law, SCOTWINC must "bear the cost of operating the audiovisual signal system . . . , the costs of totalizator equipment, mutuel department labor and equipment charges, and the costs, including labor and overhead of the organization administering the satellite wagering program." Cal. Bus. & Prof. Code § 19608.2, subd. (e)(1). The satellite wagering facility, on the other hand, must "bear the cost of satellite receiving dishes, head-end assemblies, television monitors or screens, facility buildings, labor at the satellite wagering facility other than mutuel department labor, and any and all other costs at the satellite wagering facility not specifically referred to in [section 19608.2, subd. (e)(1)]." Cal. Bus. & Prof. Code § 19608.2, subd. (b)(2).

By law, a "take out" of approximately 17% of the total "handle," *i.e.*, the total of all wagers, is deducted from wagers placed at all simulcast facilities. *See, e.g.*, Cal. Bus. & Prof. Code § 19610. The remainder of the "handle" is combined with wagers placed at the tracks and at other simulcast sites and returned as prizes to patrons holding winning tickets at the race track and at the various simulcast facilities. The 17% "take out" is, in turn, distributed to various entities in accordance with complex statutory formulae. *See, e.g.*, Cal. Bus. & Prof. Code § 19605.7.

Under the California Horse Racing Law, SCOTWINC is responsible for collection of wagers placed at simulcast facilities and for distribution of the "take out" from those wagers to various entities in accordance with statute. *Cabazon II*, 37 F.3d at 432 (App. 102; *see also*, App. 92 n. 6).

One such distribution is made "to racing associations for payment to the state as a license fee." *See, e.g.*, Cal. Bus. & Prof. Code § 19605.7, subd. (a). On the average, the license fee amounts to an approximate average of 3.5% of the "take out." *Id.; see* App. 49 (license fees range from 1.5% to 4.0%). Another distribution of 2% is "retained by the simulcast wagering facility as a commission for the right to do business, as a franchise." Cal. Bus. & Prof. Code § 19605.7, subd. (a). After all statutory distributions are made, the balance of the "take out" is divided equally among the horsemen and the racing associations (hereafter referred to collectively as the "live-race producers" or "racing industry"). *See, e.g.*, Cal. Bus. & Prof. Code § 19608.9, subd. (b).

2. The underlying tribal-state compact negotiations

At the time they first requested compact negotiations with the State, the Cabazon and Sycuan Bands of Mission Indians operated a class II bingo facility under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, and they sought to add an off-track betting capability at their gaming facility. The Tribes therefore requested compact negotiations with the State of California for entry into the system of state-regulated off-track wagering as a simulcast facility.[2]

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[2] As noted above, the California Horse Racing Board has statutory authority only to authorize the operation of simulcast facilities at county fairs or at race tracks. The Tribes' request therefore, would require a change from current practice, to accommodate the Tribes.

During the negotiations, the Tribes agreed to accept all of the statutory wager distributions save one.[3] The Tribes insisted that the State give over to them the State's 3.5% license fee. The Tribes contended that the license fee amounts to a tax on simulcast facilities and that, therefore, when the fee is collected from wagers placed at a *tribal* simulcast facility, the tax is unlawful as a matter of federal law. *Cabazon I*, 788 F.Supp. at 1516 (App. 86) ("The Tribes argue that the license fees are impermissible because they reduce the amount that the Tribes would collect from the simulcast enterprise, and so constitute a direct tax.") California expressly agreed not to tax the Tribes or their operations.[4] The State, however, refused to surrender its license fee, contending that the burden of the tax falls entirely on the live-race producers.

The parties were at impasse. In order to avoid litigation under IGRA, 25 U.S.C. § 2710(d)(7)(A)(i),[5] the parties

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[3] In addition to the 2% commission earned by the Tribes as a simulcast facility, the State agreed to pass onto the Tribes the 0.33% of the handle that is customarily distributed to the local government for regulation of the off-track wagering site. *Cabazon II*, 37 F.3d at 432 (App. 102).

[4] Paragraph 5 of the Compacts reads: "Taxes. No tax will be imposed by the State on a simulcast wagering facility established by [the Tribes], or on the operation thereof." *See* CR 19, Exh. 1, 2.

[5] The Tribes did not want to delay commencement of their off-track betting operation, and therefore did not want to await conclusion of litigation before resuming compact negotiations. California, on the other hand, had reason to fear that, were the Tribes to bring suit under IGRA, even the State's good faith dispute with the Tribes over the lawfulness of the license fee would not shield the State from issuance of a coercive remedy.

agreed to a compromise solution. The Tribes would agree to conclude a compact permitting the State to collect the disputed license fee; in return, the State agreed not to assert its Eleventh Amendment immunity in defense against a suit by the Tribes for a declaratory judgment as to the lawfulness of the disputed license fee.

The terms of the parties' "compromise settlement agreement" were memorialized in Paragraph 19(B) of the Compacts themselves, rather than in a separate document.[6] Generally speaking, the parties agreed that, if collection of the license fee were determined to be permissible, the tax revenues collected by the State after the effective date of the compact would be retained by the State; if collection of the license fee were determined to be impermissible, then the State would return the revenues so determined to have been wrongfully collected from the Tribes. *Cabazon I*, 788 F.Supp. at 1516 n. 4 (App. 86).

3. *Cabazon I* and *Cabazon II*

The Cabazon and Sycuan Bands brought their suit for declaratory relief. The district court agreed with the State that the burden of the tax falls, not on the simulcast facilities, but on the live-race producers. *Cabazon I*, 788 F.Supp. at 1518 (App. 92) ("Because the Tribes do not

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See, Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1032-1033 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991) ("The State's protestations that its failure to negotiate resulted from sincerely held views as to the meaning of the IGRA, and that it declared its willingness to resolve these legal issues of first impression by litigation, do not alter the outcome.")

[6] The terms of Paragraph 19 are set out in *Cabazon III* at App. 50.

have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the license fees do not impose an economic burden on the Tribes.") The district court also found no evidence to support the Tribes' claim that collection of the license fee even *indirectly* burdens the Tribes. *Cabazon I*, 788 F.Supp. at 1518-1519 (App. 93). Finally, the district court found that "[T]he extent and cost of state regulation as well as the nature of the services provided by California all favor permitting the license fees." *Id.* at 1519 (App. 94). The Tribes' motion for partial summary judgment was, therefore, denied, and the Tribes appealed.

In its first decision, the Court of Appeals avoided consideration of the burden of the tax. Instead, the court ruled that IGRA simply forbids taxation of the live-race producers. App. 1-5. The State, however, pointed out the error in the court's reasoning, and the court vacated its opinion. *See Cabazon II*, 37 F.3d at 432-433 (App. 103-104). In its second opinion, however, the court would identify other grounds for reversing the trial court's judgment.

In *Cabazon II*, the Court of Appeals first affirmed the district court's evidentiary finding that the burden of paying the tax falls, not on the simulcast facilities, but on the live-race producers. *Cabazon II*, 37 F.3d at 434 and n. 1 (App. 107). The court also left undisturbed the district court's finding of no evidentiary support for an argument that collection of the tax *indirectly* burdens the Tribes.

However, the Court of Appeals ruled that, even if the license fee works no identifiable burden on the Tribes, federal law nevertheless prohibits the State from collecting a 3.5% tax from the live-race producers, when the

Tribes' simulcast facilities earns only the statutory 2% commission plus the additional 0.33% that the State agreed to pass onto the Tribes in lieu of payment to local government. *Cabazon II*, 37 F.3d at 433-434 (App. 106). The court reasoned that incorporation of the Horse Racing Law's wager-distribution formula into the tribal-state compacts violates IGRA's "primary beneficiary" policy. *Id.*; *see* 25 U.S.C.A. § 2702(2).[7]

Applying the three-part preemption analysis articulated by this Court in *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980), the Ninth Circuit also ruled that, by virtue of having been incorporated into a tribal-state compact, the "compromise settlement agreement" superseded the statutory scheme that was under consideration. Therefore, according to the court, the impact on tribal interests of the State's collection of the license fee must be evaluated, for purposes of federal preemption analysis, not by considering the burden of the *tax itself*, but rather by considering who gets the money if the Tribes win the *litigation*. Reasoned the court: Since the money goes to the Tribes if they win the litigation,[8] therefore, the tax scheme

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[7] The court would later rule, in *Cabazon III*, that IGRA's policy is violated only because it is the State that earns more than the Tribes. Federal policy is not implicated, reasoned the court, so long as the primary beneficiary of the Tribes' gaming activity is an entity other than the State. App. 62-64.

[8] The court thus read Paragraph 19(B)(3), in isolation, to mean that the State would give its tax revenues to the Tribes if the license fee were determined to be "impermissible," without regard to the source of those revenues. Under the court's reading of the "compromise settlement agreement," even if the disputed license fee is collected from the live-race producers and not from the simulcast facilities, the State must nevertheless

must be "burdensome" under federal law because the statutory scheme results in the money going to the State rather than to the Tribes:

> State law does not govern this case, however. Rather, the terms of the compact control. . . . Under the Cabazon and Sycuan Compacts, if the Bands prevail in this litigation, the State is required to pay them the amount of the license fee that the State receives from racing associations based on wagers at Indian facilities. If the Bands lose, however, they will be deprived of this amount, which will go to the State. Contrary to the conclusion of the district court, the Bands do indeed have a "right" to the unpaid fees. The licensing scheme currently imposed thus constitutes an economic burden.

Cabazon II, 37 F.3d at 434 (citation omitted) (App. 108).

Finally, although the court did not disturb the district court's evidentiary finding of significant state interest in taxing the producers of the *live horse races*, the court reasoned that the State's interest is "weakened" because IGRA provides for reimbursement by the Tribes for regulatory costs associated with the *simulcast facilities* and therefore, the State cannot have a cognizable interest in taxing the live-race producers based on wagers placed at simulcast facilities. The court ruled that the State could not tax the live-race producers for regulation of horse

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give those fees to the Tribes if they are determined to be "impermissible" on any basis whatsoever. The State obviously disputes this anomalous reading of Paragraph 19(B)(3). The State agreed not to tax the *Tribes* or their operations (*see* note 4, *supra*), but the State never agreed not to tax the *racing industry*.

racing generally, because the Tribes will reimburse the State for the cost of regulating the Tribes' off-track betting facilities. *Cabazon II*, 37 F.3d at 435 (App. 110-111).

4. Proceedings on remand and *Cabazon III*

After remand from the Court of Appeals, the Tribes sought an order from the district court enforcing Paragraph 19(B)(3) of those Compacts. The Tribes argued that Paragraph 19(B)(3) had been impliedly construed by the Court of Appeals in *Cabazon II* to include an agreement by the State to surrender tax revenues collected from the racing industry alone.

The State denied any agreement to surrender the power to tax the racing industry except to the extent that such a tax might indirectly diminish the value of tribal assets. Over the objection of the State, the district court grounded its jurisdiction on the fact that the alleged contractual obligation had been incorporated into a tribal-state compact. App. 13-15. The court also rejected the State's Eleventh Amendment immunity defense, relying on language in the compacts establishing venue. App. 15; *see also*, App. 25-27.

The court refused to permit introduction of evidence on the question whether the State had agreed to surrender its power to tax the racing industry. App. 19. The court ruled that the appellate court's decree in *Cabazon II* as to the effect of Paragraph 19(B)(3) was conclusive on the district court. App. 20 ("The State cannot now be heard to claim that it did not foresee . . . that the Ninth Circuit would reason in the way that it did.")

The court properly rejected the Tribes' contention that, for purposes of 28 U.S.C. § 2202, enforcement of Paragraph 19(B)(3) necessarily follows from the fact that the Court of Appeals struck down the disputed license fee as impermissible. App. 18.[9] In recognition of the fact that the Tribes' initial complaints did not seek enforcement of alleged contractual obligations in the Compacts, the court ordered the Tribes to amend their complaints to do so. App. 18.[10]

In response to the Tribes' amended complaints, the State asserted both affirmative defenses and counterclaims. The district court granted the Tribes' motion to strike all affirmative defenses and to dismiss all counterclaims. App. 24. The States' motion for reconsideration was denied, and the State was ordered to "pay over to the Tribes the monies that have been assessed as a license fee on parimutuel off-track wagering at the [Tribes'] simulcast facilities." App. 44.

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[9] Obviously, an order striking down a tax would *ordinarily* result in an order to *cease* the taxation. The Tribes, however, sought an order compelling the State to *continue* the taxation of the racing industry so as to give the industry's tax monies to the Tribes. That sort of order could only be based on the Tribes' construction of the State's contractual obligations under Paragraph 19(B)(3).

[10] The court's recognition that the Tribes could not obtain their desired relief based on their original complaints is, of course, an acknowledgment that the adjudication of the rights and responsibilities of the parties under Paragraph 19(B)(3) had never previously been placed in issue in the proceedings and was not, therefore, properly before the Ninth Circuit in *Cabazon II*.

The Court of Appeals affirmed. App. 46. Judge Wiggins dissented on the ground that the district court lacked jurisdiction to enforce an alleged contractual obligation. App. 72.

REASONS FOR ISSUING WRIT

A. The Writ Should Issue Because the Ninth Circuit Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, and Has Sanctioned Such a Departure by the District Court, as to Call for an Exercise of this Court's Supervisory Power

1. The Writ Should Issue Because the District Court Was Without Jurisdiction over the Claims for Surrender of State Tax Revenues

This Court will grant the writ of certiorari to consider whether the lower courts had subject matter jurisdiction. *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055, 1071 (1997); *Bruner v. United States*, 343 U.S. 112 (1952). In this case, Petitioners contend that the district court was lacking in subject matter jurisdiction for several reasons.

First, neither IGRA nor any other federal statute confers jurisdiction on the federal courts to enforce tribal-state compacts, much less to enforce purely contractual arrangements between tribes and states that happen to be incorporated into tribal-state compacts. Congress was very specific in its grant of jurisdiction to federal courts respecting matters arising in connection with IGRA, and Congress did not grant federal courts jurisdiction to

enforce tribal-state compacts against either party. App. 72-79 (Wiggins, C.J., dissenting). Moreover, even if jurisdiction to enforce tribal-state compacts might be inferred from IGRA, as was the case below, that jurisdiction would necessarily be limited to enforcement of provisions relating to the regulation of class III gaming, *i.e.*, jurisdiction would be limited to adjudication of matters of *federal* interest. In this case, however, enforcement of Paragraph 19(B)(3) serves no federal purpose whatsoever. As Judge Wiggins noted in his dissent below: "As I understand the issues, IGRA is wholly irrelevant to this latter dispute." App. 73.[11]

Second, the district court lacked jurisdiction because California did not consent to the action framed by the Tribes' amended complaint. It is settled that a State may not be sued in federal court without its consent. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). To find consent, the lower courts rely on ambiguous language in the Compacts that even the Tribes themselves disavow as effecting a surrender of sovereign immunity. App. 37.

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[11] The Ninth Circuit's "alternative" rationale for jurisdiction is patently fallacious. *See* App. 56. Inasmuch as *Cabazon II* held that the taxes are levied against the assets of the racing industry, the action below cannot reasonably be characterized as an action by the Tribes to "recover" money taken by the State; if any party has an action to *recover* money improperly taken, it is the producers of the live horse races. The Tribes, in contrast, seek a *conveyance* of money taken from the racing industry. Their claim of right to the State tax revenues, therefore, does not rest on any federal law, but rests entirely on their construction of Paragraph 19(B)(3) of the Compacts. *See also* note 9, *supra*.

More importantly, this Court has ruled that, where consent to suit has not been given by a State's legislature, the court will consider whether the official purporting to waive the State's immunity to suit has the power under state law to do so. *See Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945) (inquiring whether Indiana Attorney General possessed authority to waive Eleventh Amendment immunity). The California Legislature has not generally consented to suit in federal court. *Yuan Jen Cuk v. Lackner*, 448 F.Supp. 4, 8 (N.D. Cal. 1977) (three-judge court).

In this case, the State does not dispute the Governor's power to consent to suit for declaratory relief in *Cabazon I*; moreover, the Attorney General, in the exercise of his constitutional and statutory discretion,[12] did not assert the Eleventh Amendment as a bar to the Tribes' request for declaratory relief in *Cabazon I*. However, the State does contend that the Governor would have no power under the California Constitution to expose the State Treasury to risk of liability from suit in federal court. That power is conferred on the Legislature by the California Constitution. Cal. Const., art. III, § 5 ("Suits may be brought against the State in such manner and in such courts as shall be directed by law.").

The State has repeatedly contended that the Governor never agreed, and could not agree, to a payment of

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[12] The Attorney General is designated by the California Constitution as the "chief law officer of the State," Cal. Const., art. V, § 13, and is vested by statute with "charge, as attorney, of all legal matters in which the State is interested," Cal. Gov. Code § 12511.

tax monies to the Tribes except as might be mandated by federal law as a *refund* of money improperly taken from the Tribes in the first instance. *See, e.g.*, Cal. Const., art. XVI, § 6 (prohibition against gifts of public funds); Cal. Const., art. XIII, § 31 (prohibition against surrender of the State's taxing power by contract). However, the lower courts refused to permit the State to present evidence on that issue. App. 38-39, 59-60. Nevertheless, the State contends that, even if the Governor had agreed in Paragraph 19(B)(3) of the Compacts to yield up state tax revenues as a windfall gift to the Tribes, the Governor would have no power to consent to suit in federal court to enforce such an agreement.

2. The Writ Should Issue Because the Lower Courts Cannot Come to a Consistent Position Respecting the Application of IGRA's "Primary Beneficiary" Policy to the Facts of this Case

The Court of Appeals ruled that IGRA's "primary beneficiary" policy is offended by virtue of the fact that, under the statutory wager-distribution formula, the State earns approximately 3.5% of the handle by way of taxes, whereas the Tribes' simulcast facilities earn only 2.33% of the handle. *Cabazon II*, 37 F.3d at 433-434 (App. 106). The State disagreed with the *Cabazon II* reading of IGRA, but this disagreement was of no moment, because, if *Cabazon II* was correct, the decision necessarily rendered the Compacts void.[13] It is undisputable that the primary beneficiaries of the off-track wagering on the Tribes' lands is the

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[13] For this reason, among others, California did not seek review of *Cabazon II* by this Court.

racing industry, not the State or the Tribes. Thus, under the reasoning of *Cabazon II*, the tribal-state compacts violate IGRA's "primary beneficiary" policy unless and until they are renegotiated among all beneficiary parties – *i.e.*, the Tribes, the State, and the racing industry – to arrive at a wager-distribution formulation that would afford the Tribes the status of primary beneficiary.

On remand, the State argued that, based on the *Cabazon II* interpretation of IGRA, the compacts were invalid unless renegotiated. The district court and the Court of Appeals rejected the State's contention, finding that the "primary beneficiary policy" was not offended because the Tribes had *agreed* to permit the racing industry to earn a greater share of handle than is earned by the Tribes. App. 39, 62-64. This is a *non sequitur*.

Either IGRA requires that the Tribes must be the primary beneficiaries of off-track wagering on their lands, or IGRA does not so require. If the Tribes can *agree* that the racing industry may be the primary beneficiary of off-track wagering on Indian lands, then it cannot be said that *collection of the State's license fee* "contravenes the purposes of IGRA," *see Cabazon II*, 37 F.3d at 433 (App. 106), for even if California were to cease collection of its license fee, the Tribes would still not enjoy the status of primary beneficiary – by virtue of their voluntary surrender of that status to the racing industry.

Cabazon III effectively nullifies the holding of *Cabazon II*. The court in *Cabazon III* explained that the *Cabazon II* balancing-test had been required only because the Tribes and the State had not *agreed* to permit the State to collect the license fee; the court thus contrasted the agreement

between the Tribes and the State to permit the *racing industry* to retain a greater share of the wagers than is retained by the Tribes. *Cabazon III*, 124 F.3d at 1059 (App. 63). But, of course, if the parties are competent to *agree* that the Tribes will not be the primary beneficiaries of off-track wagering on the Tribes' lands, then it cannot be said that collection of the license fee "contravenes the purposes of IGRA," *Cabazon II*, 37 F.3d at 433 (App. 106), or that the license fee is "impermissible" under that Act.

Furthermore, even if IGRA's primary beneficiary policy could reasonably be construed to apply only to the discrepancy between the earnings of the State and the earnings of the Tribes, nothing in *Cabazon II* suggests that federal policy can only be satisfied by a reduction in the *State's* share of the wagers. There is no doubt that the Tribes are themselves free to tax the producers of the live races who benefit from wagers placed at tribal simulcast facilities. Were the Tribes to do so – were they to exact from the racing industry the additional 1.17% of the handle that would increase the Tribes' share from the 2.33% that they receive under the Compacts to the 3.5% that the State retains – then it would not be the case that California earns a greater share of the handle than is earned by the Tribes, and IGRA's policy would not be "contravened." *Cabazon III*, therefore, stands for the patently discriminatory proposition that the State must forfeit its power to tax the racing industry so that the Tribes need not tax that industry.

The writ should issue to determine whether IGRA forbids California from collecting a non-discriminatory license fee from the producers of live horse races, based on wagers placed at simulcast facilities that are owned by

Indian tribes, where the Tribes have agreed to permit the racing industry to be the primary beneficiaries of the off-track wagering activity. Alternatively, the writ should issue to determine whether the Compacts here are invalid and unenforceable because the racing industry, and not the Tribes, is the primary beneficiary of the off-track wagering activities on tribal lands.

B. The Writ Should Issue to Determine Whether the Tenth Amendment Forbids the District Court from Commandeering the State's Taxing Authority for the Windfall Economic Benefit of the Tribes

Respondent Tribes candidly argued to the Court of Appeals that, because *Cabazon II* declared that Paragraph 19(B)(3) should be substantive federal law, *see* 37 F.3d at 434 (App. 108) ("State law does not govern this case. . . . Rather, the terms of the compact control"), the State's wager-distribution mechanism is now at the service of the Tribes:

> The State's repeated assertion that the decisions in this case require it "to tax the racing industry for the benefit of the Tribes," . . . is inaccurate. Rather these decisions merely require the State to fulfill its agreement with the Tribes – which has the force of federal law by virtue of incorporation into the Compacts – by requiring the Racing Associations [i.e., SCOTWINC] to continue collecting taxes from the wagers placed at the Tribes' facilities and to pay those particular taxes over to the Tribes *as a Tribal tax* on the on-Reservation wagers.

Response of Plaintiff-Appellee Tribes to Petitions for Rehearing and Suggestion for Rehearing En Banc, pp. 8-9 (italics added).

Indeed, the Tribes accurately describe the effect of the Ninth Circuit's decisions. Taken in combination, *Cabazon II* and *Cabazon III* amount to a hijacking of the State's taxing power by the federal courts below for the dubious purpose of diverting state tax revenues to the Tribes. This diversion is purportedly justified, at least in part, as being in furtherance of a purported federal policy that prohibits California, but no other entity, from receiving a greater share of wagers placed at tribal simulcast facilities than do the Tribe. Even if the federal "primary beneficiary" policy were as the Ninth Circuit describes it, the State would argue that, by the virtue of the Tenth Amendment, federal courts would have no power to commandeer the State's taxing power to further such a policy. *Cf., New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365 (1997).

The writ should issue to determine whether the Tenth Amendment forbids the district court from compelling the State to tax the racing industry for the benefit of Respondent Tribes.

C. The Writ Should Issue to Determine Whether Tribal-state Compacts Include an Implied Covenant Not to Engage in Uncompacted Class III Gaming That Is Enforceable under IGRA, 25 U.S.C. § 2710(d)(7)(A)(ii)

The decisions of the lower courts make clear that, henceforth, States would be well-served in compact negotiations to exact from Indian tribes an agreement not to violate IGRA's prohibition against un-compacted class III gaming. According to the lower courts, Indian tribes have

no obligation to comply with IGRA's prohibition against un-compacted class III gaming, 25 U.S.C. § 2710(d)(1)(C), (d)(6), unless they expressly agree to do so. However, the decisions of the courts below substantially implicate the interests of the States in connection with tribal-state compacts that are already in effect.

The State contends that when a Tribe concludes a compact with a State that authorizes specific forms of class III gaming, the compact impliedly prohibits the conduct of other forms of class III gaming. The State contends that such an implied prohibition necessarily follows from IGRA's express statement that class III gaming activities are lawful "only if such activities are – . . . (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." 25 U.S.C. § 2710(d)(1)(C).

In this case, California sued the Tribes under 25 U.S.C. § 2710(d)(7)(A)(ii), by way of counterclaim to the Tribes' claim for enforcement of the Compacts. The State sought to prove that the Tribes are engaged in casino gambling that is not authorized by the Compacts and is, therefore, unlawful under IGRA. The Court of Appeals affirmed the district court's order dismissing the counterclaim, on the ground that the State's effort to sue under section 2710(d)(7)(A)(ii), for the purpose of bringing the Tribes into compliance with IGRA's prohibition against un-compacted gaming, amounted to an effort by the State to "use the compacts as leverage from which to extend its regulatory control to other class III gaming not covered by the compacts." App. 65. Reasoned the court: "Because the slot machines and other banked and percentage games are not mentioned in the Compacts, the Bands

have not breached the Compacts." App. 67-68. Of course, the State contends that the Tribes breached the Compacts *precisely because* slot machines and other banked and percentage games are not mentioned in the Compacts.

The State contends that tribal-state compacts should not be governed by ordinary rules of commercial dealings such as *caveat emptor*, that California could properly expect that Indian tribes will comply with federal law, and that the State need not *negotiate* with the Tribes to do so. California is without jurisdiction directly to enforce its statutory slot machine prohibitions against offending Tribes. *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1995), *aff'd. sub nom, Pfingst v. Sycuan Band of Mission Indians*, 116 S.Ct. 297 (1995). The tribal-state compact is California's only mechanism for realizing Congress' assurances that class III gaming activities will not be conducted absent a tribal-state compact. Now, California is told by the Ninth Circuit that its compacts with these Tribes are useless for this purpose, because California did not exact an express promise from the Tribes not to violate federal law.

The writ should issue for the purpose of determining whether the district court erred by dismissing California's claim under 25 U.S.C. § 2710(d)(7)(A)(ii) for lack of an express promise by the Tribes not to conduct a class III gaming activity other than off-track wagering.

CONCLUSION

Tracing the history of this litigation after the decision of the district court in *Cabazon I* is like stepping through a looking glass. The Ninth Circuit in *Cabazon II* tortured this Court's preemption methodology beyond all recognition with the rather evident purpose of ensuring that the outcome of the litigation favored the Tribes, no matter the cost to reason or justice. In so doing, the court would give new meaning to the adage, "No good deed goes unpunished," by turning against the State the very compromise settlement agreement that had enabled the Tribes to bring the underlying action without need to delay commencement of off-track wagering operations.[14] Thus, the court candidly employed the rationale that the Tribes must prevail in the litigation because, under the terms of the compromise settlement agreement, if the Tribes did not prevail in the litigation, they would not get the State's money. *Cabazon II*, 37 F.3d at 434 (App. 108).

Despite the manifest improbability of the *Cabazon II* analysis, the State is nevertheless painted as a "poor sport" by the courts below – as though the State should simply have acquiesced in the judicially compelled gift of what now amounts to more than $14 million of public funds to the Tribes, and as though the State should further have acquiesced in the hijacking of its taxing power by the federal courts for the continued windfall economic benefit of the Tribes.

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[14] Judge Wiggins thus greatly understates the irony: "A compact without such a provision may not have created the preemption problem which led us to hold that the State could not collect its customary license fee." App. 73-74.

The State's efforts at restoring some sanity to the proceedings fell on deaf ears in the district court. That court perceived itself to be bound by the surprising analysis of the Court of Appeals, nevertheless acknowledging the legitimacy of the State's objections thereto. App. 20 ("The district court judge's agreement with the State on the merits of many of these arguments is of no moment at this juncture.") And, the State's hope of a fresh, fair, and dispassionate reconsideration of the *Cabazon II* reasoning in the contract-enforcement phase of this dispute presented in *Cabazon III,* proved to be misguided.

The State's last resort is the supervisory authority of this Court. Unless this Court acts to restore some semblance of reason and justice to the consideration of these issues, the State will be forced to make a windfall gift to the Tribes of some $14 million in state tax revenue and will be forced to tax the racing industry, in continuation of this gift of public funds into the future.

For the reasons stated, the Court is respectfully requested to grant the petition for certiorari.

Respectfully submitted,

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CONTENTS OF APPENDIX

Page

Ninth Circuit Opinion filed 5/9/94 .....App. 1

District Court Memorandum of Opinion and Order filed 7/12/95 .....App. 6

District Court Memorandum of Opinion and Order filed 4/26/96 .....App. 23

District Court Memorandum of Opinion and Order filed 7/19/96 .....App. 41

Ninth Circuit Decision filed 9/2/97 (*Cabazon III*).....App. 46

District Court Decision filed 3/31/92 (*Cabazon I*) .....App. 80

Ninth Circuit Decision filed 10/6/94 (*Cabazon II*).....App. 101

CABAZON BAND OF MISSION INDIANS,
a federally recognized Indian Tribe;
Sycuan Band of Mission Indians,
Plaintiffs-Appellants,

v.

Pete WILSON, Governor, et al.,
Defendants-Appellees.

No. 92-15751.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 5, 1993.

Decided May 9, 1994.

Appeal from the United States District Court for the Eastern District of California.

Before: BOOCHEVER, THOMPSON, and O'SCANNLAIN, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We consider the power of the State of California to tax offtrack betting activities on Indian reservations.

I

Plaintiffs Cabazon Band of Mission Indians and Sycuan Band of Mission Indians ("the Bands") conduct simulcast wagering (offtrack betting) on their reservations to raise tribal revenue. Such activities are regulated by the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, which categorizes Indian gaming into three classes; simulcast wagering is Class III gaming. Under the IGRA, states and Indian tribes must negotiate

compacts to regulate the terms under which Class III gaming may be conducted. Here, California and the Bands entered into compacts for the Bands to operate their simulcast wagering facilities.

Southern California Off Track Wagering, Inc. ("SCOTWINC") is a quasi-governmental organization of racing associations formed under California law. Cal.Bus. & Prof.Code § 19608.2. Both Bands entered written agreements with SCOTWINC and the racing associations which conduct the live horse races. SCOTWINC arranges for the racing associations' broadcast signals to be transmitted to the Bands' on-reservation simulcast wagering facilities. SCOTWINC also accepts the wagers and handles the cash at the Bands' facilities.

Under the terms of the compacts between California and the Bands, SCOTWINC distributes to the Bands 2.33% of the money wagered at their simulcast wagering facilities. Two percent is the typical commission offered by racing associations for operating a satellite wagering facility; the remaining 0.33% is paid to the Bands in their deemed "local government" capacity. The Bands contend that an additional amount should be distributed to them rather than remitted to the State of California measured by the proportion of license fees payable on wagers placed at their facilities.

SCOTWINC remits the license fee imposed under Cal.Bus. & Prof.Code §§ 19605.71(a) and (b), 19606.5 and 19606.6 which is a percentage of all wagers placed. Different percentages are paid based on the location of the wager (ontrack or offtrack), the type of wager (conventional or exotic), and the type of race (breed of horse and

distance). Part of this license fee is based on wagers placed at Indian wagering facilities. California concedes that the license fee is a tax. The Bands assert that part of the license fee based on wagers placed at Indian facilities is a tax on Indian activities, prohibited under the IGRA, and should be payable instead to the Bands.

Because the State of California and the Bands could not agree whether the State had the power to collect the license fee based on wagers at Indian facilities, the negotiated compacts specifically state that the Bands will sue the State for declaratory relief.[1] After the Bands brought suit, both sides moved for summary judgment which the district court granted for the State. *Cabazon Band of Mission Indians v. State of California*, 788 F.Supp. 1513 (E.D.Cal.1992). The Bands timely appealed.

II

The Bands contend that the state's license fee is impermissible under the IGRA, section 2710(d)(4). We agree.

The IGRA expressly withholds from states the "authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." *Id.*

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[1] Specific consequences flow to the parties depending on the resolution of this appeal as detailed in paragraphs 19(B)(2) and 19(B)(3) of each compact.

The license fee is indeed a "tax, fee, charge or other assessment," within the meaning of the IGRA as conceded by the State but it falls upon the racing associations.[2] The racing associations conduct the horse races and collect the wagers. Afterwards, they pay a commission to the Bands and pay a license fee to the State based on the wagers placed both at the track and at all simulcast wagering facilities.

Nevertheless, such a tax is impermissible under the IGRA if the racing associations are entities that have been "authorized by an Indian tribe to engage in a class III activity." 25 U.S.C. § 2710(d)(4). They clearly are. The Bands have expressly authorized the racing associations to go onto tribal land and to conduct simulcast wagering.[3] Without this authorization by the Bands, the racing

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[2] The Bands do not pay any of their commission to the State, do not write a check to the State, and do not have any direct contact with the State with respect to the license fee. The Bands' argument that the tax is imposed directly on them because California law imposes different percentage license fees for wagers made at satellite wagering facilities is not persuasive. *See* Cal.Bus. & Prof.Code §§ 19605.3, 19605.71, 19610 *et seq.* Simply because there are different tax rates depending on whether the wagers were placed at a satellite wagering facility or the originating track does not mean that the tax is imposed directly on the owners of the satellite wagering facility. The statutes the Bands cite also establish different tax rates for different breeds of horses and distances. Cal.Bus. & Prof.Code § 19605.71. This, of course, does not mean that the breed of horse pays a direct tax. Place of wager and breed of horse are simply variables in the tax formula.

[3] Of course, not all of the racing associations' activities require authorization by the Bands. The racing associations exist independently of the Bands. The State can collect license

associations could not collect wagers at Indian facilities. Nothing more need be said. The license fee is a tax on an entity authorized by the Bands to engage in simulcast wagering, a class III activity. As such, it is prohibited by section 2710(d)(4).[4]

III

Because of our disposition on the merits, we do not reach the question of whether state jurisdiction is pre-empted under general principles of federal Indian law. The district court's grant of summary judgment is reversed and remanded with instructions to enter summary judgment for the Bands.

REVERSED and REMANDED with instructions.

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fees based on all wagers not placed at Indian simulcast facilities without implicating the IGRA; this gaming does not require Band authorization and would occur whether or not the Bands conducted simulcast wagering.

[4] The Bands contend that the licensing fees are an indirect tax on the Bands and are therefore prohibited under the IGRA. We need not address this issue here, because we decide this case on other grounds. Regardless of whether the fees have any indirect effect on the Bands, the State is not authorized under the IGRA to collect under these circumstances.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CABAZON BAND OF MISSION INDIANS, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA,

Defendant.

Civ. No. S-90-1118-DFL

MEMORANDUM OF OPINION AND ORDER

(Filed Jul. 12, 1995)

The Cabazon, Sycuan, Barona and Viejas Bands of Mission Indians seek a preliminary injunction that would enjoin the defendants (collectively "the State") from directing Southern California Off-Track Wagering, Inc., to discontinue the electronic signal sent to off-track wagering facilities of the Bands. On June 30, 1995, the court issued a temporary injunction against the State to this effect. The request for preliminary injunction is brought by the Bands under 28 U.S.C. § 2202. In addition to this relief, the Bands also seek an order under 28 U.S.C. § 2202 directing the State to adhere to the compacts negotiated with the Bands.

I.

Much of the procedural history of this action can be gleaned from the opinion of this court and the Ninth Circuit. *See Cabazon Band of Mission Indians v. California*, 788 F. Supp. 1513 (E.D. Cal. 1992), *rev'd*, 37 F.3d 430 (9th

Cir. 1994). In brief, each of the Bands negotiated a compact with the State of California under the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701-2721. The Cabazon and Sycuan Bands and the State were unable to agree on the legality of the licensing fee imposed by the State on the racing associations when the fee was based on the revenues generated at the Bands' simulcast operations. The compacts of these two Bands provide that the State and the Bands would agree to disagree and that the dispute concerning the licensing fee would be resolved in federal court by means of a declaratory judgment action brought by the Bands. The Cabazon and Sycuan compacts further provide that were the Bands to prevail in the declaratory relief action, within 60 days of a final judgment, "the State shall pay over to [the Band] the amount of all state license fees previously distributed to the State under this Compact exclusive of assessments [reflecting the State's actual costs in regulation] and [the Band] shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the [Band's] simulcast wagering facility." *See* Cabazon Compact at ¶ 19; Sycuan Compact at ¶ 19.[1] The

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[1] The language of the Cabazon and Sycuan Compacts concerning the resolution of the licensing fee dispute is virtually identical. Paragraph 19 of the Cabazon Compact provides in full:

19. Distribution of Handle.

(A) Generally. Subject to subsections (B) and (C) below, the amounts deducted from parimutuel wagers at the Cabazon simulcast wagering facility, and the distribution of such amounts, shall be the same as that provided for under state law

Barona and Viejas compacts also provide that the Bands and the State agree to disagree concerning the licensing

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for simulcast wagering facilities, other than fairs, in the southern zone.

(B) State License Fee.

1. Cabazon shall seek a declaratory judgment against the State form a United States District Court of competent jurisdiction as to whether the deduction and distribution of the state license fee under Business and Professions Code Section 19596.6, subdivisions (d)(1), (d)(2), (k), and (1), are permissible under the Act[, IGRA].

2. In the event a final judgment is obtained that the deduction and distribution of the sate [sic] license fee is permissible under the Act, and following the exhaustion of all appellate review the State shall retain all license fees previously distributed to it, and shall be entitled to collect the state license fee from all wagers at the Cabazon simulcast wagering facility. Under such circumstances, the State shall not be entitled to any further assessment against or payment from Cabazon to cover the costs of State regulation of the Cabazon simulcast wagering facility, and the Cabazon simulcast wagering facility shall be entitled to all benefits and to participate in all programs under applicable state law which are available to any simulcast wagering facility, other than a fair, in the southern zone.

3. In the event a final judgment is obtained that the deduction and distribution of the state license fee i;s [sic] impermissible under the Act, and following the exhaustion of all appellate review, the State shall pay over to Cabazon the amount of all state license fees previously distributed to the State under this Compact exclusive of assessments due and owing under subparagraph 4, below, and Cabazon shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Cabazon simulcast wagering facility. The amount of state license fees previously distributed to the State and not reasonably claimed by the State as due and owing from the commencement of operation of the facility shall be paid over to the Cabazon as soon as practicable and in any event, not later than sixty (60) days following final judgment.

fee but rather than requiring the Bands to bring further declaratory judgment actions, the Compacts provide that the parties shall be bound by the Cabazon/Sycuan litigation:

> The parties acknowledge that the legality of the imposition, deduction, and distribution by the State of a license fee . . . on tribally-operated satellite wagering operations . . . is currently being litigated . . . in the U.S. District Court for the Eastern District of California. Following the exhaustion of all appellate review of such litigation, the parties to this Compact will abide by that final outcome concerning the applicability of the said State license fee to the simulcast wagering facility contemplated by this Compact.

Barona Compact ¶ 20; Viejas Compact ¶ 19. The Barona and Viejas compacts also contain provisions dictating the distribution of the license fees to the Bands in the event that the Bands prevail in the litigation.

In a decision of March 1992, this court granted judgment to the State and held that the licensing fee was not a tax on the Bands and was not inconsistent with either IGRA or other principles of federal Indian law. As to the Bands' claim that IGRA preempted the fee, the court held that IGRA barred only a direct tax, that the fee placed on the racing associations was not a tax on the Bands, and

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4. If it is judicially determined that the State is not entitled to receive the state license fee, the parties, in accordance with Paragraph 11 (B), shall modify this Compact to provide for assessment by the State of the actual cots [sic] incurred by it in regulating the Cabazon simulcast wagering facility and for the settlement and collection of such costs due and owing from the commencement of operation of the facility.

that the fee was consistent with Congress' goal in IGRA of achieving equal treatment and uniform regulation of Indian class III gambling by the States:

> Congress' intent to establish an equal footing for competing tribal and non-Indian gaming enterprises, to provide for uniform regulation, and to permit the States to achieve certain economic goals indicates that, except for direct state taxation, Congress did not intend to preempt the state tax at issue here. California seeks to treat revenue generated by racing associations on Indian lands in precisely the same fashion as revenue generated on non-Indian lands. Such a tax furthers the twin goals of equality and uniformity in regulation. Finally, preemption would deprive the State of substantial revenues traditionally collected from pre-existing racing association activities.

Cabazon Band of Mission Indians v. California, 788 F. Supp. at 1517. Similarly, the court found that the fee was not preempted by general principles of federal Indian law because the fee was not a burden placed on the Bands and because of the extensiveness of the State's regulation of off-track betting in general. *Id.* at 1517-21. The opinion rejected as circular the Bands' claim that the fee placed an economic burden on them because if they prevailed in the litigation the State had agreed in the compact to pay over the fee to the Bands. *Id.* at 1518.

The Ninth Circuit reversed. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994). The court found that the licensing fee violated IGRA because the State's take from the handle exceeds that of the Bands as the owner of the simulcast facility. Moreover, the court

held that even though the licensing fee was not a direct tax on the bands, the fee undermined tribal interests because the "Bands bear the actual burden of the license fee":

> [I]f the Bands prevail in this litigation, the State is required to pay them the amount of the license fee that the State receives from the racing associations based on wagers at Indian facilities. If the Bands lose, however, they will be deprived of this amount, which will go to the State. Contrary to the conclusion of the district court, the Bands do indeed have a "right" to the unpaid fees.

Id. at 434. The court held that "the express objectives of IGRA, when combined with the Bands' interests, preclude the application of the State's license fee." *Id.* at 435. The matter was remanded to the district court with instructions to enter summary judgment for the bands. The decision of the Ninth Circuit is final.

II.

The litigation has now entered a new and confusing phase. For reasons discussed below, the State has refused to pay over the fees to the Bands, has declared the compacts null, and has threatened to cut off the simulcast signal as of July 1, 1995, unless the Bands agree to enter into negotiations for new compacts. The Bands then moved for a temporary restraining order with the Barona and Viejas Bands seeking intervention for this purpose. The procedural vehicle chosen by the Bands for enforcing the compacts is 28 U.S.C. § 2202, which provides that "further necessary or proper relief based on a declaratory

judgment or decree may be granted" after notice and hearing. The Bands seek an injunction that would bar the State from taking any steps to discontinue the simulcast signal. In addition, the Bands seek enforcement of those provisions of the compacts that require the State to pay over to the Bands the accumulated and future licensing fees collected by the State from the racing associations.

The State makes a number of arguments in its briefing in opposition to the motion for TRO and for further relief. Its arguments appear to fall into three categories. First, it argues that the decision of the Ninth Circuit invalidated the compacts "for an obvious lack of a meeting of minds." According to the State, the only dispute tendered to the federal court was whether or not the licensing fee was a tax on the Bands. In the State's view, the Ninth Circuit's holding that the fee was impermissible, although not a tax on the Bands, was an unexpected development vitiating the compacts. The State asserts that it never would have entered into these compacts had it known that it was surrendering any authority to tax the racing associations or that the Ninth Circuit would interpret the settlement language in the compacts as providing the predicate for its finding of burden on the Bands.

Second, the State argues that the Bands operate other illegal gambling operations, primarily slot machines, and that in such circumstances the State may reasonably decline to support the Bands' illegal activities through the simulcast compacts and therefore may withdraw from the compacts. *See* Defendants' Memorandum of Points and Authorities on Opposition to Barona Band Application for Temporary Restraining Order (June 26, 1995) at 8.

Third, the State argues that whatever its basis for attacking the continuing validity of the compact – whether because of the nature of the Ninth Circuit's reasoning or the Bands alleged illegal activities – the court lacks jurisdiction to review its decision to withdraw from the compacts. The state contends both that the court lacks subject matter jurisdiction to enforce a compact under IGRA and that to entertain such a suit would violate the Eleventh Amendment.[2]

The TRO was entered June 30, 1995, and so expired ten days later on July 10, 1995. Hearing was held on July 10, 1995. At the hearing the State agreed to maintain the simulcast signal at least through July 14, 1995. The matter now for decision is whether a preliminary injunction should issue requiring the State to continue the simulcast signal to the Bands. This order addresses that question but also attempts to clarify and resolve certain of the other issues presented.

III.

The first question is whether the court has subject matter jurisdiction to enforce a Tribal-State compact. IGRA specifically provides that a Tribe may bring suit in

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[2] The State concedes that there was jurisdiction to hear the declaratory judgment action first tendered to the court because it presented the issue of whether the licensing fee was preempted by federal law for which there is jurisdiction under 28 U.S.C. §§ 1331 and 1362. The State also concedes that in the Cabazon and Sycuan compacts it waived its Eleventh Amendment immunity for the declaratory judgment action to determine the validity of the licensing fee.

federal district court against a State that fails to negotiate a compact in good faith. 25 U.S.C. § 2710(d)(7)(A). It would be extraordinary were the statute to provide jurisdiction to entertain a suit to force the State to negotiate a compact yet provide no avenue of relief were the State of defy or repudiate that very compact. Such a gap in jurisdiction would reduce the elaborate structure of IGRA to a virtual nullity since a state could agree to anything knowing that it was free to ignore the compact once entered into. IGRA is not so vacuous. The statute provides that a compact may provide "remedies for breach of contract." § 2710(d)(3)(C)(v). Here the compacts all include a provision that "Judicial review of any action taken by either party under this Compact, or seeking any interpretation of this Compact, shall be had solely in the appropriate United States District Court." Further, the compacts all include provisions that the compact shall remain in force unless "determined to be invalid by a court of competent jurisdiction," that either party may bring suit to amend the compact in a "court of competent jurisdiction"; and that "the compact shall be governed by and construed in accordance with the laws of the United States." These provisions provide for an action for breach of the compact in federal district court just as IGRA envisions. Because IGRA expressly authorizes a compact to include remedies for breach of contract, and because IGRA's grant of jurisdiction to require good faith bargaining would be pointless were there no jurisdiction to enforce the compact, jurisdiction to enforce the compacts is created by IGRA and 28 U.S.C. §§ 1331 and 1362. *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir.

1995) (finding jurisdiction for tribes' request for injunction under either "IGRA or the federal common law of Indian affairs that allocates jurisdiction among the federal government, the tribes, and the states"); *Kickapoo Tribe of Indians v. Babbitt*, 827 F. Supp. 37, 44 (D.D.C. 1993), *rev'd on other grounds*, 43 F.3d 1491 (D.D.C. Cir. 1995) (indicating that the determination of the validity of a tribal-state compact under IGRA presents a federal question); *Forest County Potawatomi v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995) (finding that a tribal suit to enforce its rights under IGRA invoked federal rights).

Moreover, the court's jurisdiction is not limited by the Eleventh Amendment in the circumstances here. The State has waived its Eleventh Amendment immunity in the compact language cited above. *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). The compact language clearly and unequivocally subjects the State to suit in federal district court. The *Port Authority* Court found waivers of the Eleventh Amendment where the states involved expressly submitted to suit in either state or federal district court. *Id.* at 307. Here the waiver is even more readily apparent, where the State agreed to suit in federal district court alone. The State's claim that the compacts only subject the State to suit for declaratory relief is not borne out by the compact language which provides for judicial review of "any action taken by either party under this Compact." This sweeping language waives immunity for suit to enforce the compacts.

In short, the court concludes that it has jurisdiction to enforce the compacts. The court has jurisdiction both to order the State to continue the signal and to pay over

monies collected from the racing associations as licensing fees.[3]

IV.

There are two further procedural questions. First, whether intervention by the Barona and Viejas bands is appropriate under F. R. Civ. P. 24(B), and second, whether the Bands' action to enforce the compact should be brought as a new claim or may go forward under § 2202. As to intervention, Rule 24(b) provides in pertinent part:

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[3] The State also advances the claim, although with little discussion, that under the Tenth Amendment, Congress lacks the power to require the State to extend its system of off-track betting onto Indian lands for tribal benefit. The State relies on the Supreme Court's recent decision in *New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408 (1992), which held that Congress may not coerce a state to enact and enforce a federal regulatory program. *See also Board of Natural Resources v. Brown*, 992 F.2d 937, 946-47 (9th Cir. 1993). Several courts have determined, however, that IGRA's directions to states do not violate the Tenth Amendment. *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); *Rumsey Indian Rancheria v. Wilson*, 1993 WL 360652 (E.D. Cal. July 30, 1993); *Yayapai Prescott Indian Tribe v. State of Arizona*, 796 F. Supp. 1292 (D. Az. 1992). Furthermore, to the extent there is any ambiguity whether IGRA's provisions could violate the Tenth Amendment, the ambiguity attaches only to IGRA's directive that states engage in good faith negotiations. That is not the issue here. The only question in this case is whether a federal court can enforce the terms of an agreement which a State has voluntarily accepted. This case does not implicate the Tenth Amendment, or any federal regulatory program forced on the states.

> upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

See Vanegas v. Skaggs, 867 F.2d 527, 529 (9th Cir. 1989) (three criteria for permissive intervention are independent jurisdiction, timeliness, and common question of law or fact with the existing action). The intervenors present the same issues of law and fact as the Cabazon and Sycuan Bands since the intervenors' rights to the license fees and to the simulcast signal under their compact with the State expressly depend on the outcome of the Cabazon and Sycuan litigation. The State is not prejudiced by the intervention, and the intervention seems timely since it followed fairly promptly upon the State's announcement of its intention to cut off the simulcast signal. Finally, there is jurisdiction to enforce the compacts of the Barona and Viejas Bands for the same reasons that there is jurisdiction to enforce the Cabazon and Sycuan compacts. The motions to intervene are granted.

Whether to resolve the issues presented under § 2202 or require a new claim for enforcement presents somewhat thornier issues. The State opposes resolution of the case under § 2202 because it wishes to bring a counterclaim or defense relating to the Bands' illegal gambling operations and because it would like to put before the court the history of the compact negotiations for the purpose of demonstrating that the basis for the Ninth Circuit decision was not anticipated and that the State

would never have agreed to give up its right to tax the racing associations.

A motion under § 2202 is an appropriate method by which to resolve the State's claim that the Ninth Circuit decision was in some way so unexpected as to invalidate the compacts. This question is very much of a piece with the original declaratory relief action that the parties agreed to in the compacts. However, a motion under § 2202 is not the appropriate way to consider the Bands' claim that the State is now in breach of the compacts. This claim arises from actions by the State after the Ninth Circuit decision and involves a host of new issues, particularly the State's counterclaim or defense that its obligation to adhere to the compact has been voided by the Bands' alleged illegal activity. *See Penthouse International, Ltd. v. Barnes*, 792 F.2d 943, 951 (9th Cir. 1986) (reversing district court order based on § 2202 that extended beyond the scope of the original proceeding).

Accordingly, the Bands must amend the complaints now on file to seek relief for breach of the compacts under IGRA. The State may then amend its answer to assert any defenses or counterclaims that it may have to this claim. The court cannot resolve the Bands' claim to the funds and to continuation of the compacts on the basis of the pleadings now filed. In future briefing, the parties must address whether federal law permits recision, amendment, or invalidation of compacts such as these and in what circumstances. It may be necessary to interpret certain provisions within the compacts. No

doubt there will also be a factual dispute as to the existence, scope and character of the alleged illegal operations and their relationship of the illegal operations to the simulcast wagering at the reservations.

V.

The court can now rule on the question appropriately brought by the Bands under § 2202: whether the Ninth Circuit decision provides a basis to the State to withdraw from the compacts. The answer to that question is no. The State would put before the court the negotiating history of the compacts to demonstrate the intent of the parties and that the parties did not foresee a decision that found the fee to be impermissible yet not a tax on the Bands. Such a procedure is unnecessary and uncalled for. Each of the compacts contains an unequivocal integration clause: "This Compact contains the entire agreement of the parties hereto with respect to the matters covered by this Compact and no other statement, agreement, or promise made by any party, officer, or agent of any party shall be valid or binding." Barona Compact at ¶ 22. Moreover, each of the compacts broadly tendered for decision by the federal court whether the license fee was legal. The litigation, as framed by the parties in the compacts, was to address "whether the deduction and distribution of the state license fee are permissible under [IGRA]." There is no limitation in the language of the compacts suggesting that the Bands could seek only a determination of whether the licensing fee were a tax on the Bands. Further, the parties envisioned that the Ninth Circuit might

find that the license fee was impermissible and specifically provide for payment by the State of the fee to the Bands in that event.

The substance of the arguments that the State now makes as to why it would never have agreed to a compact had it known how the Court of Appeals would decide that action are merely variations on arguments already presented to that court as to why the licensing fee should be upheld.[4] The district judge's agreement with the State on the merits of many these arguments is of no moment at this juncture. In short, the compact placed the legality of the licensing fee before the Court of Appeals without restriction and provided for the possibility that the fee would be declared invalid. The State cannot now be heard to claim that it did not foresee that it would lose the litigation or that the Ninth Circuit would reason in the way that it did.

For these reasons the court grants further declaratory relief to the Bands under 28 U.S.C. § 2202 and finds that the State may not withdraw from the compacts because it

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[4] For example, that State argues that to pay the license fee to the Bands would place the Bands in a preferred position as compared to all other simulcast operators and that the State never anticipated such an outcome. But his very argument was advanced in the district court opinion and was not persuasive to the Court of Appeals. Similarly, the State expresses its dismay that its agreement to settle the disagreement over the legality of the fee, in the event that the fee should be found illegal, was relied upon by the Court of Appeals in deciding the legality of the fee. The State notes that it would have been better off declining the compact and forcing the Bands to sue under IGRA. This argument was accepted by the district court, but rejected in the Court of Appeals, and it cannot be revisited now.

did not anticipate that the Ninth Circuit would find that the fee was impermissible although not a tax on the Bands.

VI.

Once the amended complaints are on file, the court will enter a preliminary injunction extending the TRO if the State still intends to terminate the simulcast signal while this litigation is pending. The balance of hardships tips sharply in favor of the plaintiffs. Were the signal halted during this litigation, the Bands would lose the income, good will, and customer base they have developed and rely upon. Their employees could well lose their positions. By contrast, the State is only ordered to do that which it already contracted to do in the compacts. Moreover, at least serious questions are raised as to the State's ability to withdraw from the compacts.

By 4:30 p.m., July 12, 1995, the State shall inform the court and plaintiffs, by fax, whether it will stipulate to the continuance of the TRO until further order of court. If the State will so stipulate, as counsel for the State seemed to indicate at oral argument, then the court will set a telephonic status conference to set dates for the filing of the amended complaints and answer and for future proceedings. Otherwise, it will be necessary for the amended complaints to be on file **by July 14, 1995,** so that the

preliminary injunction may be entered once the TRO expires.

IT IS SO ORDERED.

Dated: 12 July 1995.

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs, v. PETE WILSON, et al., Defendants.	CIV-S-90-1118 DFL MEMORANDUM OF OPINION AND ORDER (Filed Apr. 26, 1996)

Plaintiffs Cabazon Band of Mission Indians, Sycuan Band of Mission Indians, Viejas Band of Mission Indians and Barona Band of Mission Indians ("the tribes") each filed suit to recover past and future monies they claim are owed to them under compacts each entered with defendant, the State of California ("the State"), under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* (1988) ("IGRA"). The compacts regulate satellite parimutuel horse race wagering on the tribes' lands.

The history of this action is somewhat involved. The action was first filed to resolve a dispute as to whether a licensing fee legally could be collected from the racing associations by the State or whether the fee was an impermissible tax. The tribes and the State had agreed to the terms of compacts governing simulcast wagering in all other respects and agreed to tender the licensing fee issue to the district court for resolution. The court ruled that the fee could be collected and that the State's willingness to "agree to disagree" so that a compact could be formed should not weigh in the analysis as to the legality of the

fee. The Ninth Circuit reversed, holding that the fee could not be collected in part because the State had agreed to pay over the fee to the tribes if the State lost the litigation. *See Cabazon Band of Mission Indians v. California*, 788 F. Supp. 1513 (E.D. Cal. 1992), *rev'd*, 37 F.3d 430 (9th Cir. 1994).

After the mandate issued from the Court of Appeals, the State threatened to shut down the simulcast signal and declined to pay the licensing fees to the tribes. This court issued a temporary restraining order on June 30, 1995, prohibiting the State from terminating the signal. On July 12, 1995, the court issued a further order in response to a motion by the tribes to enforce the compacts. In that order the court held: (1) subject matter jurisdiction exists under IGRA to enforce a tribal-state compact; (2) the Eleventh Amendment immunity to suit has been waived by the State in the compacts; and (3) the tribes must amend their complaints to seek relief from the State's alleged breach of the compacts.[1]

The tribes filed amended complaints alleging that the State is in breach of the compacts for failing to pay over to the tribes the licensing fee. The State answered, and the tribes together now move to strike the State's five affirmative defenses to their complaints, and to dismiss the State's three counterclaims. For the reasons stated below, the tribes' motion is granted.

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[1] The court also rejected the State's argument that the Ninth Circuit decision imposed an interpretation of the compacts so unexpected as to provide a basis for the State's withdrawal from the compacts.

I. Motion to Strike Affirmative Defenses

Rule 12(f) provides that the court may strike any "insufficient defense" from a defendant's pleading. The party moving to strike a defense as insufficient carries a heavy burden – it must establish that "there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed." Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial*, § 9:381 (1995). Although motions to strike are generally disfavored, "where the motion may have the effect of making the trial of the action less complicated, or have the effect of otherwise streamlining the ultimate resolution of the action, the motion to strike [legally insufficient defenses] will be well taken." *California ex rel. State Lands Commission v. United States*, 512 F.Supp. 36, 38 (N.D.Cal. 1981). While prejudice to the moving party may be a factor in considering a motion to strike, such a showing is not required: "the district court could properly grant the motion to strike for the purpose of streamlining the ultimate resolution of the action and focussing the jury's attention on the real issues of the case." *Fantasy v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), *rev'd on other grounds, Fogerty v. Fantasy*, 114 S.Ct. 1023 (1994); Schwarzer, *supra* at §§ 9:409-9:410.

A. Eleventh Amendment Immunity

The State's first affirmative defense asserts immunity from suit under the Eleventh Amendment. This contention has been resolved previously by the order of July 12,

1995. As found in that order, the State waived its immunity when it agreed to compact language laying venue in federal court for suits seeking interpretation or enforcement of the terms of the compact. *See* July 12, 1995 order at 10.[2] The State makes no argument why the Eleventh

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[2] As stated in the July 12, 1995, order:

> The Statute provides that a compact may provide "remedies for breach of contract." § 2710(d)(3)(C)(v). Here the compacts all include a provision that "Judicial review of any action taken by either party under this Compact, or seeking any interpretation of this Compact, shall be had solely in the appropriate United States District Court." Further, the compacts all include provisions that the compact shall remain in force unless "determined to be invalid by a court of competent jurisdiction," that either party may bring suit to amend the compact in a "court of competent jurisdiction"; and that "the compact shall be governed by and construed in accordance with the laws of the United States." These provisions provide for an action for breach of the compact in federal district court just as IGRA envisions. . . . [T]he court's jurisdiction is not limited by the Eleventh Amendment in the circumstances here. The State has waived its Eleventh Amendment immunity in the compact language cited above. *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). The compact language clearly and unequivocally subjects the State to suit in federal district court. The *Port Authority* Court found waivers of the Eleventh Amendment where the states involved expressly submitted to suit in either state or federal district court. *Id.* at 307. Here the waiver is even more readily apparent, where the State agreed to suit in federal district court alone. The State's claim that the compacts only subject the State to suit for declaratory relief is not borne out by the compact language which

Amendment issue should be revisited at this point.[3] Accordingly, the State's first affirmative defense shall be stricken.

B. Implied Covenant Not To Violate IGRA

The State's second and fourth affirmative defenses derive from its assertion that the tribes are in violation of IGRA because they are engaging in class III gaming other than as provided for in the compacts.[4] Specifically, the State claims that the tribes have placed illegal slot machines in their gambling establishments.

The State acknowledges that the compacts are silent concerning class III gaming other than simulcast horse racing. Nonetheless, the State argues that an implied

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provides for judicial review of "any action taken by either party under this Compact." This sweeping language waives immunity for suit to enforce the compacts.

[3] The State requests a round of additional briefing in light of the Supreme Court's recent decision in *Seminole Tribe of Florida v. Florida*, 96 Daily Journal D.A.R. 3499 (March 27, 1996). In *Seminole Tribe*, the Court held that Congress lacked the authority to abrogate the states' eleventh amendment immunity from suits by tribes to compel good faith negotiation of tribal-state compacts, *see* 25 U.S.C. § 2710(d)(7)(A)(I). It appears that the holding in *Seminole Tribe* does not affect this case because here the State has affirmatively waived its Eleventh Amendment immunity in a compact it voluntarily entered into. However, should the State wish to argue otherwise it may do so in a motion for reconsideration.

[4] IGRA prohibits class III gaming on tribal lands, other than those class III games that are permitted and regulated by a tribal-state compact. 25 U.S.C. § 2710(d)(1).

promise by the tribes not to engage in any other class III gaming should be read into the compacts because such gaming is in violation of IGRA. On the basis of this implied promise, the State contends that the tribes are in material breach of the compacts and thus that the State is relieved of any obligation under the compacts, including the obligation to pay to the tribes the licensing fee collected from the racing associations. The State makes the same kind of claim in slightly different legal garb by alternatively styling the tribes' alleged violations of IGRA as a failure of an implied precondition to the State's duty to perform under the compacts.

In so framing its defenses, the State would use the compacts as leverage from which to extend its regulatory control to other class III gaming not covered by the compacts. The State finds a basis for this extension in IGRA and argues that it is because of IGRA that the implied covenant or implied precondition not to engage in class III gaming should be read into the compacts. But IGRA gives to the State no authority to regulate the conduct of class III gaming on tribal lands other than what is provided for by compact.

Prior to IGRA, tribes had unfettered freedom to conduct class III gaming provided the state had not prohibited gambling entirely, *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); after IGRA tribes had no authority to conduct such gaming unless expressly sanctioned by a tribal-state compact, 25 U.S.C. § 2710(d)(1). Moreover, by entering such compacts, tribes necessarily assented to state regulation of matters governed in the compact. 25 U.S.C. § 2710(d)(7)(A). This regulatory authority had been denied to the states prior to IGRA. By

making a tribe's right to conduct class III gaming contingent upon its entering a compact with a state, and by granting the states authority to regulate class III gaming by use of the compact, IGRA expanded the states' role in governing matters of class III gaming on tribal lands. *See Seminole Tribe of Florida v. Florida*, 96 D.A.R. at 3503 ("It is true enough that [IGRA] extends to the States a power withheld from them by the Constitution") (citing *Cabazon*, 480 U.S. 202).

But while IGRA gave the states greater ability to regulate class III gaming through the device of a compact, it does not provide for any general regulatory authority on the part of the states beyond the compact. Instead, the states' enforcement authority is carefully limited to those specific matters covered in a tribal-state compact as to which the tribe has affirmatively ceded jurisdiction to the state. Thus, IGRA provides that "[t]he United States district courts shall have jurisdiction over . . . any cause of action initiated by a State . . . to enjoin a class III gaming activity located on Indian lands *and conducted in violation of any Tribal-State compact* . . . " 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). *Accord* 25 U.S.C. § 2710(4)(5) (tribes may regulate class III gambling unless in conflict with "State laws and regulations made applicable by any Tribal-State compact"). IGRA specifically provides that the compacts may allocate regulatory jurisdiction between the tribes and the states. *See* 25 U.S.C. § 2710(3)(C)(I) and (ii) (compact may include "provisions relating to – (I) the application of the criminal and civil laws and regulations of the Indian tribe or the State . . . ; (II) the allocation of criminal and civil jurisdiction between the state and the Indian tribe"). Beyond

those matters covered by compact, enforcement of IGRA's prohibitions remains the exclusive province of the federal government and of the tribes themselves. *See* 18 U.S.C. § 1166(d) (United States has exclusive right to prosecute violations of State gambling laws, applicable to class III gaming in Indian country, unless compact confers criminal jurisdiction to the State); 25 U.S.C. § 2713(d) (tribes regulatory authority over gaming establishments); 25 U.S.C. §§ 2704, 2713 (National Indian Gaming Commission created with authority to impose civil fines for gaming violations). *See generally, Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) (state may not prosecute violations of state law involving class II and class III gaming on Indian lands).

The legislative history underscores this limitation on state power, as the Senate Committee on Indian Affairs took great pains to communicate its intent that the states' ability to regulate gaming be restricted to matters covered by the compacts. The Senate Committee stressed that IGRA must be understood in the context of the long history of tribal immunity from state criminal and regulatory jurisdiction, during which tribes fell under state jurisdiction only when, and to the extent that, they consented to it:

> It is a long and well-established principle of Federal-Indian law . . . that unless authorized by an act of Congress, the jurisdiction of State governments and the application of State laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal

> governments before State jurisdiction can be extended to tribal lands.

S.Rep. 446, 100th Cong., 2d session (1988), U.S. Code Cong. & Admin. News 1988, pg. 3075. It was the Senate Committee's intent that IGRA not alter this balance of power. Thus, in order to give effect to the states' desire to regulate class III gaming on Indian lands while respecting the tribes' right to be free from unconsented-to state authority, the Senate Committee created the tribal-state compact as a mechanism under which tribes could elect to submit to limited state control in exchange for the ability to conduct class III gaming legally:

> [c]onsistent with these principles [of tribal sovereignty], the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities . . . The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of State laws to activities conducted on Indian land is a tribal-state compact.

Id. at 3075-76. According to the Senate Committee, the scope of state authority would be strictly limited by the terms of the compact, and the tribes would not be subject to any greater state jurisdiction than that to which they consented:

> [i]n no instance does [IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other purpose . . . it is the Committee's intention that to the extent tribal governments elect to relinquish rights in a tribal-State compact . . . the relinquishment of such rights . . . shall not be construed . . . as a general abrogation of other reserved rights or of tribal sovereignty.

Id. See also id. at 3084 ("The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands"); *and* Additional Views of Mr. McCain, *id.* at 3103 ("I understand Senator Evans' concerns regarding the potential overextension of the intended scope of the Tribal/State compact approach . . . I believe it is important to again underscore the statement that appears on page 10 of the Report: 'The Committee does not intend to authorize any wholesale transfer of jurisdiction from a tribe to a state' ").

To infer a general covenant in the compacts by the tribes not to engage in gaming in violation of state law and IGRA, would be tantamount to finding a cession by the tribes of general regulatory authority to the State over Class III Indian gaming in which the State's enforcement tool would be its threat to void or breach the compact. The text of IGRA, its legislative history and the historical context in which it was passed, all point to the opposite conclusion: that state authority over class III gaming reaches no further than the explicit terms of the tribal-state compacts. IGRA does not provide a basis from which the court may infer any promises by the tribes beyond those that are specifically provided for in the compacts.

For these reasons, the State's second and fourth affirmative defenses fail as a matter of law. The compacts do not include implied preconditions or implied covenants by the tribes to prohibit class III gaming on tribal lands other than as provided for in the compacts.

C. Unclean Hands

In its third affirmative defense, the State contends that under the doctrine of "unclean hands" the tribes are not entitled to the relief they seek because of their IGRA violations. The unclean hands doctrine is "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Chitkin v. Lincoln National Ins. Co.*, 879 F.Supp. 841, 853 (S.D.Cal. 1995), *quoting Precision Instrument Mfg. Co. v. Automotive Maintenance Machine Co.*, 65 S.Ct. 993 (1945). The unclean hands doctrine applies when (1) the plaintiff has engaged in wilfull or fraudulent misconduct; (2) the plaintiff's wrongful conduct is related to the controversy in issue; and (3) the defendant has suffered serious harm as a result of the plaintiff's wrongful actions. *Chitkin*, 879 F.Supp at 854.

Equitable defenses such as unclean hands are generally available in actions governed by federal common law. *See e.g., Ellenberg v. Brockway, Inc.* 763 F.2d 1091, 1097 (9th Cir. 1985) (unclean hands defense applied in ERISA action). However, in fashioning a federal common law of equitable defenses in areas of law controlled by complex federal statutory schemes, a court must define the scope

and limitations of such defenses keeping in mind the federal policies underlying the statutory scheme. *See AM International Inc. v. International Forging Equipment*, 743 F.Supp. 525, 531 (N.D.Ohio 1990) (no unclean hands defense in CERCLA actions because it would contradict statutorily-created joint and several liability among joint tortfeasors), *citing Mardan Corp. v. C.G.C. Music Co.*, 804 F.2d 1454 N.3 (9th Cir. 1986). *See also Textile Workers Union of America v. Lincoln Mills of Alabama*, 77 S.Ct. 912, 918 (1957) (in creating federal common law, court must be guided by principles and policies of controlling federal statute); 11 B. Witkin, *Summary of California Law*, Equity § 13 (9th Ed. 1990) (defense of unclean hands should not be recognized where result would be contrary to public policy).

In light of the strong federal policy to limit the reach of state authority over tribal affairs to matters specifically covered in the tribal-state compact, the State's unclean hands defense fails. Enforcement of IGRA's prohibition against class III gaming that is not covered by a compact is a matter solely within federal control where, as here, the compacts are silent on the subject. As with the claim of implied covenants discussed above, to allow the State to assert alleged illegal class III gaming as an equitable defense would be, in effect, to extend state regulatory authority over matters as to which the Congress has denied the states jurisdiction except through the compact and the agreement of the tribes. Accordingly, the State's third affirmative defense shall be stricken.

D. Failure to Join Indispensable Parties

As its fifth affirmative defense the State asserts that the tribes have failed to join indispensable parties, namely, the racing association and horsemen who would retain the licensing fees were the tribes to loose [sic] their breach of compact claim against the State. Rule 19 requires joinder of additional parties if (1) in the absence of that additional party, "complete relief cannot be accorded among those already parties," Fed.R.Civ.P. 19(a)(1), or (2) the additional party claims an interest relating to the subject of the action, and proceeding in that party's absence may impede its ability to protect that interest or leave any persons already parties subject to substantial risk of incurring double or inconsistent liabilities, Fed.R.Civ.P. 19(a)(2).

The State's affirmative defense under Rule 19(a)(1) falters because the State does not demonstrate that the tribes will be unable to achieve all the relief they seek in the absence of the nonjoined parties. *See Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (Rule 19(a)(1) argument fails if plaintiffs can receive all relief they seek without absent parties). The Ninth Circuit has ruled that the tribes are entitled to the license fee monies under the terms of the compacts, and that the terms of the compacts control over state law. *See Cabazon*, 37 F.3d at 434. The tribes therefore will be able to obtain the relief they seek from the State under the terms of the compacts notwithstanding any grievance the racing association and horsemen may have against the State under state law.

The defense fails under Rule 19(a)(2) as well. First, there is no indication that the racing association and

horsemen have claimed any interest in this litigation, despite having had many years to do so. *See De Wit v. Firstar Corp.*, 879 F.Supp. 947, 995 (N.D.Iowa 1995) (No Rule 19(a)(2) defense where absent party fails to assert interest in litigation). Moreover, the State does not explain how its interests or those of the absent parties will be prejudiced by proceeding with only those parties currently before the court. This is not a case involving a limited fund to which several parties have made a claim. Rather, the State has incurred a contractual obligation to the tribes to pay over certain monies collected as license fees from the racing association and horsemen. The State argues that taxing the racing association and horsemen and paying those monies to the tribes may violate state law. Even if it does, however, the State's contractual obligation to the tribes will remain, *see Cabazon Band of Mission Indians v. California*, 37 F.3d 430, 434 (9th Cir. 1994) (compact terms prevail over state law), and the racing association and horsemen will be free to pursue any grievance they may have against the State in a separate action if they so choose. The State does not show that the result of this case may impair the absent parties' ability to do so.

Because the State has not advanced valid grounds for requiring joinder of indispensable parties under Rule 19(a), its fifth affirmative defense is stricken as a matter of law.

II. The State's Counterclaims

The State asserts three counterclaims against the tribes. The first is for a declaration that the tribes are

conducting class III gaming in violation of the compacts, and an order enjoining such activity. The second is for a declaration that the tribes have materially breached their obligations under the compacts and as such have excused the State's performance. The third is for a declaration that the compacts are void as unenforceable and for a declaration that the State never promised to pay over license fees that were determined to fall on the racing association and horsemen.

The tribes argue that they are immune from suit by the State on all three counterclaims. However, in the compacts the tribes stipulated to federal court jurisdiction as follows: "Judicial review of any action taken by either party under this Compact, or seeking an interpretation of this Compact, shall be had solely in the appropriate United States District Court." *See* Barona Band Compact at ¶ 18. Because each of the State's counterclaims seeks review of actions taken under the compact or interpretation of compact terms, the above venue provision constitutes a waiver of the tribes' immunity from suit on those counterclaims. *See McClendon v. United States*, 885 F.2d 627, 629-30 (9th Cir. 1989) (tribes may waive sovereign immunity by clear expression of intent to do so; scope of waiver defined by terms of consent).

While the tribes' sovereign immunity argument is not well taken, the State's counterclaims fail to state a claim and must be dismissed under Fed.R.Civ.P. 12(b)(6). The first counterclaim asks for a declaration that the tribes are violating the compacts by engaging in unauthorized gaming, and seeks an injunction against future violations. However, as explained above, the compacts contain no

such implied promises and to read them into the compacts would violate the policy and language of IGRA. Further, the State's authority to seek injunctions under 25 U.S.C. § 2710(d)(7)(A)(ii), is restricted to suits to enjoin class III gaming that is in violation of the terms of a tribal-state compact. The State therefore has no basis for seeking the requested injunctive relief and declaratory relief. This counterclaim must be dismissed as a matter of law.

The second counterclaim seeks a declaration that the tribes materially breached their obligations under the compacts by violating IGRA. Because the tribes made no such promise, express or implied, this counterclaim must be dismissed as well.

The State's third counterclaim seeks two declarations. First, the State requests a declaration that when it entered the compacts it agreed to pay the license fee monies to the tribes only if the court determined that the burden of the fees fell directly upon the tribes themselves, and not on the racing association and horsemen. This claim is foreclosed by the opinion of the Ninth Circuit. The compacts provide that the State will pay over to the tribes all past license fees collected, and an amount equal to the license fees in the future, should the court determine that "the state license fee is impermissible under the Act". *See* Cabazon Compact at ¶ 19(B)(1) & (3). The Ninth Circuit has determined that the State's license fee scheme as applied to the tribes through the compacts is impermissible under IGRA. *Cabazon*, 37 F.3d at 433-35. It follows that the State must pay the fee to the tribes as provided by the compact. The State's request for declaratory relief amounts to an attempt to relitigate the appeal and to re-

write the compacts to avoid the effect of the Ninth Circuit's decision.

Second, citing the Ninth Circuit's *Cabazon* decision, the State asks for a declaration that the compacts are void under IGRA because the racing associations and horsemen receive more revenue from the simulcast wagering on tribal lands than do the tribes, and as such the tribes are not the "primary beneficiar[ies]" of the wagering activity. This argument misconceives IGRA and draws an inaccurate parallel between the licensing fee and revenue earned by the racing associations and horsemen.

The tribes and the State left unresolved in their compacts whether under IGRA and general principles of Indian law, the licensing fee at issue could be levied and retained by the State. Had the tribes and the State reached agreement on the matter there would have been no litigation and no violation of IGRA. Here there is no dispute in the compacts that the horsemen and racing associations may receive their customary take from the gambling proceeds. This revenue is not an assessment by the State on the horse racing activity, and in any event it has been agreed to as part of the compacts. There is no violation of IGRA.

The State's request for declaratory relief in its third counterclaim fail as a matter of law.

III. Conclusion and Order

For the foregoing reasons, the tribes' motion to strike is GRANTED as to all affirmative defenses, and the

tribes' motion to dismiss is GRANTED as to all counterclaims. The State shall report to the court within 14 days of the date of this order as to how it shall comply with the compacts in light of the ruling by the Court of Appeals.

IT IS SO ORDERED.

Dated: 26 April 1996

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs, v. PETE WILSON, et al., Defendants.	CIV-S-90-1118 DFL **MEMORANDUM OF OPINION AND ORDER** (Filed Jul. 19, 1996)

Defendants raise several arguments in support of their motion for reconsideration of the court's order of April 26, 1996, in which the court granted the plaintiffs' motion to strike and to dismiss. Finding none of the arguments persuasive, the court denies the motion.[1]

Defendants first argue that the court's conclusion that the State has waived its Eleventh Amendment immunity must be reconsidered in light of the United States Supreme Court's recent opinion in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). In *Seminole*, the court held that Congress, acting on the basis of its power to regulate Indian commerce, lacks authority to abrogate the states' immunity under the Eleventh Amendment. In this case, however, under the terms of the compact, the State has expressly consented to federal court jurisdiction, and therefore has waived its Eleventh Amendment immunity.

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[1] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D.Cal. Local Rule 230(h).

See Order of April 26 at 4-5. The State contends that it should be relieved of the effect of its waiver because it made the waiver under the assumption, now rejected in *Seminole,* that Congress properly abrogated the states' Eleventh Amendment immunity in passing IGRA. However, the State was on notice when it negotiated the compacts that the issue of Congress's power to abrogate was unsettled; indeed, several states chose to challenge the federal courts' jurisdiction to entertain suits brought against them under IGRA rather than assent to such jurisdiction. California could have made a similar challenge, or otherwise provided in the compacts for a contingency such as that presented by the *Seminole* decision, but it chose not to do so. The State's attempt to extricate itself from its waiver, on the grounds that such waiver was made under "duress," must be rejected.

The State next argues that the Ninth Circuit's recent decision in *Crow Tribe of Indians v. Racinot,* U.S.App. LEXIS 14517 (9th Cir., June 14, 1996) compels reconsideration of the court's conclusion that the State is not authorized under IGRA to enjoin or regulate class III gaming activities on tribal lands when those activities are not addressed in a tribal-state compact. In *Crow,* the Crow Tribe challenged state and federal agents' confiscation of mechanical slot machines from a casino on the Crow Tribe reservation. In concluding that the enforcement action was valid, the Ninth Circuit held that (1) the tribal gaming commission lacked the authority to interpret the tribal-state compact as authorizing the use of mechanical slot machines; (2) the tribal-state compact did not permit the use of mechanical slot machines; (3) the federal and state authorities' search and seizure did not violate the

Fourth Amendment; and (4) the Crow tribe's due process claim failed because it lacked a property interest in the operation of mechanical slot machines. *Id.* at 4-7.

The *Crow* opinion neither holds nor suggests that a state may on its own accord, and without federal involvement, halt or regulate uncompacted class III gaming or void a compact because of such unauthorized gaming. Indeed, in *Crow* the State of Montana prevailed upon *federal* authorities to put an end to uncompacted class III gaming on tribal lands. *Id.* at 4. The State of California may seek to do the same here.

Next, the State repeats its argument that the tribes had an affirmative duty under the compact to seek amendment of the compact if they believed that "subsuquent changes in state or federal law may affect the scope of [ ] permissible activities." Compacts, ¶ 11(A). However, this compact provision has no bearing on the current dispute because the tribes have never relied upon "changes in applicable law" in responding to the State's allegations that the tribes are conducting illegal class III gaming on tribal lands. This provision cannot reasonably be read to grant to the State the authority to regulate class III gaming on tribal lands, authority denied to them under IGRA absent a clear accession on the part of the tribes.

The State next argues that it is inconsistent for the court to infer a cause of action on the part of the tribes to enforce the negotiated compact as against the State, but refuse to infer a cause of action on the part of the State to redress the tribes' alleged conduct of uncompacted class III gaming. But implying a cause of action to enforce a

negotiated compact under which the State has consented to suit in federal court does no violence to the policies of IGRA and of federal Indian law in general. However, to allow the State to sue to redress gaming activities that are not addressed in a tribal-state compact would violate a fundamental tenet of federal Indian law: Indian tribes may not be subjected State regulatory authority without their assent. *See* Order at 7-11.

Finally, the State contends that the Ninth Circuit's *Cabazon* opinion does not support the granting of summary judgment for the tribes because the *Cabazon* court did not conclude that the license fee was impermissible under IGRA. The appellate court did, however, hold just that: "[t]he express objectives of IGRA, when combined with the Bands' interests, preclude the application of the State's license fee . . . [w]e conclude that IGRA preempts the State of California from taxing offtrack betting activities on tribal lands." *Cabazon*, 37 F.3d 430, 435 (9th Cir. 1994). The Ninth Circuit concluded its opinion with an express directive to this court to "enter summary judgment for the Bands." *Id.* The State again asks this court to accept arguments that would place the court in conflict with the directions of the appellate court and a fair reading of its opinion.

The motion for reconsideration is DENIED and summary judgment is now awarded to the tribes. Within 14 days of this order the State shall pay over to the tribes the monies that have been assessed as a license fee on parimutuel offtrack wagering at the plaintiffs' simulcast facilities. The tribes may seek interest, if appropriate, by post-judgment motion.

The court will not stay this order.

IT IS SO ORDERED.

Dated: 19 July 1996.

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

CABAZON BAND OF MISSION INDIANS, a federally recognized Indian Tribe; Sycuan Band of Mission Indians, Plaintiffs-Appellees, Barona Band of Mission Indians, a federally-recognized Indian tribe a/k/a Barona Group of Capitan Grande Band of Mission Indians, Plaintiff-Intervenor-Appellee, Viejas Band of Mission Indians, Intervenor-Appellee,

v.

Pete WILSON, Governor of the State of California; State of California; California Horse Racing Board, Defendants-Appellants. Southern California Off-Track Wagering, Inc.; Del Mar Thoroughbred Club; Hollywood Park, Inc.; Los Angeles Turf Club; Oak Tree Racing Association; Los Angeles County Fair; Los Alamitos Race Course, Applicants in Intervention-Appellants.

Nos. 96-16432, 96-16443.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 16, 1997.

Decided Sept. 2, 1997.

Before: WIGGINS, JOHN T. NOONAN, JR., and TROTT, Circuit Judges.

TROTT, Circuit Judge:

I. Overview

The plaintiffs in this case are four bands of Indians – the Cabazon Band of Mission Indians, the Sycuan Band of Mission Indians, the Barona Band of Mission Indians, and

the Viejas Band of Mission Indians (collectively, the "Bands") – who operate simulcast wagering facilities on their tribal lands. In this suit, the Bands seek to force the defendants-Governor Pete Wilson, the California Horse Racing Board, and the State of California (collectively, the "State") – to turn over to the Bands license fees which the State collects from California's horse racing associations based on the revenues generated at the Bands' facilities.

The action arises out of Tribal-State Compacts into which the parties entered pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701-2721. In those Compacts, the parties agreed to submit to the district court the question of whether the license fees are permissible under IGRA. Because the State agreed to turn over the fees to the Bands if the fees are impermissible under IGRA, and because we held in a prior decision that the fees are impermissible, we affirm the district court's decision ordering the State to turn over the fees.

Also before us is the appeal by Southern California Off-Track Wagering, Inc. ("SCOTWINC") and six racing parks (collectively, the "Applicants") from the district court's denial of their motion to intervene as defendants. Because the Applicants waited until after the district court had resolved the vast majority of the case and until only the motion for reconsideration remained, we affirm the district court's denial of intervention.

II. Background

Despite its long and convoluted history, this case begins and ends with four Tribal-State Compacts, entered into by the State and each Band pursuant to IGRA. These

Compacts govern the Bands' operation of simulcast wagering facilities and the State's collection of fees from that activity. In these Compacts, the State agreed to pay over to the Bands the amounts of past and future license fees it collected from the racing associations, if a federal district court declared the fees impermissible under IGRA. In a prior decision, we declared them impermissible. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir.1994) (hereinafter, "*Cabazon II*"). We now hold the State to the terms of the Compacts to which it agreed.

A.

The initial story is set forth in the district court's decision in *Cabazon Band of Mission Indians v. State of California*, 788 F.Supp. 1513 (E.D.Cal.1992) (hereinafter, "*Cabazon I*"), and in our decision in *Cabazon II*. We will review only the necessary facts. IGRA authorizes Indian tribes to conduct certain gaming operations on tribal lands and establishes three classes of gaming operations. Off-track betting on horse racing at simulcast facilities is classified as class III gaming under IGRA and is permissible only if: (1) it is authorized by the governing body of the Indian tribe, (2) it is located in a State that permits such gaming, and (3) it is conducted in conformance with a Tribal-State compact. 25 U.S.C. § 2710(d)(1).

California permits such off-track wagering, having established an extensive state regulatory scheme to dictate how the money wagered on these races is distributed. *See* Cal. Bus. & Prof.Code §§ 19605-19611. The statutory plan provides for distribution of all wagers in predetermined percentages to various entities, including

the State, the simulcast facility operators (here, the Bands), and the racing associations. *See id.* § 19605.71. After the bettors receive their winnings and these statutory distributions are made, the remaining funds are divided equally between the horsemen and the racing associations. *See id.* §§ 19605.8, 19606. Under California's regulations, the racing associations pay license fees to the State in the amount of 1.5% to 4.0% of the revenue generated at the off-track facility. *See id.* §§ 19611, 19606.5, 19606.6, 19605.7(i), 19605.71(d).

In 1990 and 1991, the four Bands and the State entered into compacts pursuant to IGRA allowing the Bands to operate off-track wagering facilities on their lands. The Compacts set out the distribution of the wagers, mirroring the distributions set forth in the State's regulatory scheme. The Bands and the State, however, could not agree whether California has jurisdiction to collect license fees based on revenues generated at the Bands' simulcast facilities. In the Cabazon and Sycuan Compacts, those Bands and the State therefore agreed to submit the issue to a federal district court for resolution. They also agreed that if the fees were impermissible, the State would pay the past and future fees it collected over to the Bands, and if the fees were permissible, the State would retain and continue to collect the fees. These terms were set out in Paragraph 19 of the Cabazon Compact[1] as follows:

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[1] The language of the Cabazon and the Sycuan Compacts concerning resolution of the license fee dispute is virtually identical.

(B) State License Fee.

1. Cabazon shall seek a declaratory judgment against the State from a United States District Court of competent jurisdiction as to whether the deduction and distribution of the state license fee under Business and Professions Code Section 19596.6, subdivisions (d)(1), (d)(2), (k), and (l), **are permissible under the Act** [, IGRA].

2. In the event a final judgment is obtained that the deduction and distribution of the state license fee is permissible under the Act, and following the exhaustion of all appellate review, the State shall retain all license fees previously distributed to it, and shall be entitled to collect the state license fee from all wagers at the Cabazon simulcast wagering facility. . . .

3. In the event a final judgment is obtained that the deduction of the state license fee is impermissible under the Act, and following the exhaustion of all appellate review, **the State shall pay over to Cabazon the amount of all state license fees previously distributed to the State under this Compact** exclusive of assessments due and owing under subparagraph 4, below, and **Cabazon shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Cabazon simulcast wagering facility**. The amount of state license fees previously distributed to the state and not reasonably claimed by the State as due and owing from the commencement of operation of the facility shall be paid over to Cabazon as soon as practicable and in any event, not later than sixty (60) days following final judgment.

(Emphasis added.) The Barona and Viejas Bands similarly disagreed with the State about the license fees; in their Compacts, these Bands and the State agreed to be bound by the result in the Cabazon and Sycuan litigation.

Pursuant to the Compacts, the Cabazon and Sycuan Bands brought suit in the district court, seeking a declaratory judgment. The district court held that the collection of license fees was permissible under IGRA because the fees did not constitute either a direct tax or an impermissible indirect tax on the Bands. *Cabazon I*, 788 F.Supp. 1513. We reversed. *Cabazon II*, 37 F.3d 430. We held that "IGRA preempts the State of California from taxing off-track betting activities on tribal lands." *Id.* at 435. Analyzing "whether Congress has, by implication, acted to preempt the extension of state authority onto Indian reservations in this instance," *id.* at 433, we considered federal, tribal, and state interests in the extension of the State's licensing scheme to tribal gaming. Central to our analysis was our conclusion that, under the terms of the Compacts which govern this case, the Bands have a "right" to the unpaid license fees. We remanded to the district court with instructions to enter summary judgment in favor of the Cabazon and Sycuan Bands. Our decision in *Cabazon II* is central to the resolution of the instant dispute, and it limits the task before us.

B.

After *Cabazon II*, the litigation entered, in the words of the district court, "a new and confusing stage." The State refused to pay the fees to the Bands, declared the Compacts invalid, and threatened to cut off the simulcast

signal unless the Bands agreed to enter into negotiations for new compacts. In response, the Cabazon and Sycuan Bands moved for an injunction to prevent the cessation of the signal. Invoking 28 U.S.C. § 2202, those Bands also sought enforcement of the Compact provisions requiring the State to pay past and future fees. The Barona and Viejas Bands moved to intervene as plaintiffs. The State opposed enforcement of Paragraph 19(B)(3), arguing: (1) the district court lacked subject matter jurisdiction to enforce the Compacts; (2) the State was immune under the Eleventh Amendment from the Bands' attempt to enforce the Compacts; (3) our *Cabazon II* decision, holding that the fee was not a tax but was nonetheless impermissible, was so unexpected that it invalidated the Compacts; and (4) the Bands breached the Compacts by operating illegal gaming operations.

Concluding that it had subject matter jurisdiction under IGRA to enforce the Compacts and that the State had waived its Eleventh Amendment immunity in the Compacts, the district court considered whether a § 2202 motion was the appropriate procedural vehicle to resolve the remaining issues. The district court first determined that it could resolve the State's claim that our decision was so unexpected as to invalidate the Compacts. The State sought to introduce the negotiating history of the Compacts to show that the parties did not foresee a decision that found the fee to be impermissible but not to be a tax on the Bands. On July 12, 1995, the district court rejected this effort to introduce extrinsic evidence as to the intent of the parties, concluding that "the Compacts placed the legality of the licensing fee before the Court of

Appeals without restriction and provided for the possibility that the fee would be declared invalid." 7/12/95 order at 15. The district court then concluded that it could not consider the Bands' claims that the State was in breach of the Compacts and, accordingly, ordered the Bands to amend their complaints to seek relief for breach of the Compacts under IGRA. The district court stated that it would enter a preliminary injunction once the Bands filed their amended complaints. Finally, the district court granted the Barona and Viejas Bands' motion to intervene.

The Bands then filed an amended complaint, seeking a declaration of the rights and obligations of the parties under Paragraph 19(B)(3) of the Compacts and the enforcement of the Compacts. In its answer, the State asserted, as affirmative defenses and counterclaims, that: (1) it was immune under the Eleventh Amendment; (2) the Bands violated IGRA by operating illegal slot machines, thus breaching the Compacts and excusing the State's performance; (3) the Bands failed to join indispensable parties – the racing associations; (4) the Compacts are invalid because the State never promised to pay license fees to the Bands if the court determined those fees fell on the racing association rather than the Bands; and (5) the Compacts are invalid under IGRA because the Bands are not the primary beneficiaries. On April 26, 1996, the district court rejected the State's contentions, granted the Bands' motion to strike the affirmative defenses, dismissed the counterclaims, and ordered the State to report within fourteen days how it would comply with the Compacts.

At this point in the litigation, SCOTWINC and six racing associations moved for leave to intervene as defendants in this action. The district court denied the motion as untimely. SCOTWINC and the tracks appeal the denial of intervention.

The State then moved to reconsider. On July 19, 1996, the district court denied the motion for reconsideration and granted summary judgment in favor of the Bands. The court ordered the State to pay over to the Bands the license fees from pari-mutuel offtrack wagering at the Bands' simulcast facilities. The State appeals this order of the district court.

III. Jurisdiction

Initially, we must determine whether the district court had subject matter jurisdiction over the Bands' action to enforce the Compacts and to require the State to pay over to the Bands the license fees. The State contends that the court lacked jurisdiction, arguing that the Compact provision at issue – Paragraph 19 – is merely a contractual agreement incorporated into the Tribal-State Compacts. The dispute, they reason, is purely contractual in nature and therefore beyond the jurisdiction of the federal courts. Although it is true that the federal courts do not have jurisdiction over run-of-the-mill contract claims brought by Indian tribes, *see Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir.1980), this claim is not based on a contract that stands independent of the Compacts. Rather, it is based on an agreement contained within the Compacts

and entered into by the parties, during their IGRA negotiations, in order to resolve a disputed question and to complete the Compacts. The State's obligation to the Bands thus originates in the Compacts. The Compacts quite clearly are a creation of federal law; moreover, IGRA prescribes the permissible scope of the Compacts. We conclude that the Bands' claim to enforce the Compacts arises under federal law and thus that we have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362.

The State argues that IGRA confers federal jurisdiction over only the three causes of action specified in 25 U.S.C. § 2710(d)(7)(A)(i)-(iii): (1) an action arising from the failure of the state to enter into negotiations or conduct negotiations in good faith; (2) an action to enjoin class III gaming activity on Indian lands that is conducted in violation of a compact; and (3) an action to enforce mediation procedures in the event a compact cannot be reached. We believe that the State construes both federal question jurisdiction and IGRA too narrowly and underestimates the federal interest at stake. In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 814 n. 12, 106 S.Ct. 3229, 3235, 92 L.Ed.2d 650 (1986), the Supreme Court recognized that "[s]everal commentators have suggested that our § 1331 decisions can best be understood as an evaluation of the nature of the federal interest at stake." The Court noted "the importance of the federal issue in federal-question jurisdiction". The district court recognized the federal interest at stake here and the importance of the enforcement of Tribal-State compacts in the federal courts:

> It would be extraordinary were the statute to provide jurisdiction to entertain a suit to force

> the State to negotiate a compact yet provide no avenue of relief were the State to defy or repudiate that very compact. Such a gap in jurisdiction would reduce the elaborate structure of IGRA to a virtual nullity since a state could agree to anything knowing that it was free to ignore the compact once entered into. IGRA is not so vacuous.

7/12/95 order at 8. We agree that Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to Indian tribes during good-faith negotiations of Tribal-State compacts, knowing that they may repudiate them with immunity whenever it serves their purpose. IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein.

Our conclusion is bolstered by IGRA's express authorization of a compact to provide remedies for breach of contract. 25 U.S.C. § 2710(d)(3)(C)(v). This provision invites the tribe and the state to waive their respective immunities and consent to suit in federal court. By envisioning the enforcement of a compact and any contractual obligations assumed pursuant to a compact in federal court, IGRA necessarily confers jurisdiction to the federal courts.

An alternative ground for jurisdiction exists. We held in *Cabazon II* that federal law preempts the State from collecting the taxes. The Bands sue to recover money taken by the State in violation of federal law. The Bands's cause of action arises under the laws of the United States. Jurisdiction exists under 28 U.S.C. § 1362; *see Forest*

County Potawatomi Comm. of Wis. v. Norquist, 45 F.3d 1079, 1082 (7th Cir.1995).[2]

Thus, the Bands' action seeking to enforce the Tribal-State Compacts clearly and necessarily arises under IGRA, and we have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362.

IV. Enforcement of the Compacts

The State presents four major arguments as to why we should not enforce Paragraph 19(B)(3): (1) the State is immune from suit under the Eleventh Amendment; (2) the State never agreed to surrender the license fees it collected from the racing industry to the Bands unless the court determined that they were an impermissible tax on the Bands; (3) the Compacts are invalid because the racing associations and the horsemen, not the Bands, are the primary beneficiaries; and (4) the Bands materially breached the Compacts by operating illegal slot machines, thereby rendering the Compacts unenforceable against the State. Each of these arguments is unavailing.

A. Eleventh Amendment Immunity

The State contends that it is immune from the Bands' action to enforce the Paragraph 19 obligation. The Eleventh Amendment bars Indian tribes from suing state governments in federal court without their consent.

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[2] Notably, if the federal courts lack jurisdiction to enforce Tribal-State compacts, then both tribes and states may be left with no forum in which to enforce compacts, given the sovereign immunity of each.

Blatchford v. Native Village of Noatak, 501 U.S. 775, 779-82, 111 S.Ct. 2578, 2580-83, 115 L.Ed.2d 686 (1992). However, there are two well-established exceptions to the Eleventh Amendment's protections: Congress may abrogate the Eleventh Amendment without the consent of the states when acting pursuant to section 5 of the Fourteenth Amendment, or a state may waive its immunity by consenting to suit in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). Here, the State waived its Eleventh Amendment immunity in the Compacts.

"[A] State will be deemed to have waived its immunity 'only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.' " *Atascadero*, 473 U.S. at 239-40, 105 S.Ct. at 3146 (*quoting Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662 (1974) (internal quotations and alterations omitted)).

In Paragraph 19, the State expressly agreed that the Bands "shall seek a declaratory judgment against the State from a United States District Court of competent jurisdiction as to whether the deduction and distribution of the state license fee . . . are permissible under the Act." Moreover, in Paragraph 19, the State not only consented to the suit, but it also agreed to the remedy.

Further, the State's waiver of its immunity to suit in federal court is not limited to the declaratory judgment action specified in Paragraph 19, but rather extends to all actions under the Compact. The parties agreed to the following Compact provision: "Judicial review of any

action taken by either party under this Compact, or seeking any interpretation of this Compact, shall be had solely in the appropriate United States District Court. . . . " By agreeing to judicial review by the district court of all actions under the Compacts and of any interpretation of the Compacts, the State consented to be subject to suit in federal court for the enforcement of Paragraph 19(B)(3). *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990) (general consent-to-suit provision coupled with statutory venue provision clearly indicate that states waived Eleventh Amendment immunity).

B. Paragraph 19 and the Intent of the Parties

The State now claims it never intended to surrender the license fees it collected from the racing industry to the Bands. It contends that, instead, it agreed in Paragraph 19(B)(3) to pay the license fees to the Bands only if the court determined that these fees constituted a tax on the Bands themselves and not on the racing associations. The State wishes to introduce extrinsic evidence which it believes will support this interpretation. We reject the State's proffered construction of Paragraph 19 as contrary to its plain and unambiguous language and reject the State's efforts to introduce extrinsic evidence.

In asking us to examine extrinsic evidence as to the meaning of Paragraph 19, the State attempts to escape the natural consequences of our *Cabazon II* decision. The State first contends that we answered a question which the Compacts did not contemplate presenting to the federal courts – whether the fees are impermissible even if they

are not a tax on the Bands. However, the question framed in the Compacts was broad: "whether the deduction and distribution of the state license fee under [California law] are permissible under the Act." As the district court observed, "There is no limitation in the language of the compacts suggesting that the Bands could seek only a determination of whether the licensing fee [was] a tax on the Bands." 7/12/95 order at 14. In *Cabazon II*, we reached a result contemplated by the parties: that the fees are impermissible under IGRA. Thus, the district court properly rejected the State's argument: "The State cannot now be heard to claim that it did not foresee that it would lose the litigation or that the Ninth Circuit would reason in the way that it did." 7/12/95 order at 15.

The State next claims that we did not adjudicate the rights and obligations of the parties under Paragraph 19(B)(3) in *Cabazon II*, and thus that question remains open. Again, the State is mistaken. Although we agreed that "the license fee imposed falls directly upon the racing association, and not the Bands," 37 F.3d at 434, we concluded that "the Bands bear the actual burden of the license fee." *Id.* We reasoned:

> Under the Cabazon and Sycuan Compacts, if the Bands prevail in this litigation, the State is required to pay them the amount of the license fee that the State receives from the racing associations based on wagers at Indian facilities. If the Bands lose, however, they will be deprived of this amount, which will go to the State. Contrary to the conclusion of the district court, the Bands do indeed have a "right" to the unpaid

> fees. *Id.* Moreover, we made clear that the Compact terms, not state law, govern the resolution of this dispute. *Id.*

Regardless of whether we fully adjudicated the rights and obligations of the parties under Paragraph 19 in *Cabazon II* or whether that issue is before us to address anew, we see no need for extrinsic evidence to illuminate the meaning of Paragraph 19. We will not entertain strained interpretations of a clear and unambiguous compact provision. Instead, we hold the State to its word.

The State repeats its insistence that the phrase "impermissible under the Act" is ambiguous, and that the State intended that phrase to mean only that they were impermissible as a tax on the Bands in violation of 25 U.S.C. § 2710(d)(4). As noted above, the plain language of the Compacts does not contain such a restriction. The State further contends that, in Paragraph 19(B)(3), it agreed only to return to the Bands any taxes that it had imposed on the Bands. It did not agree to surrender to the Bands taxes collected from the racing industry. Once again, however, Paragraph 19(b)(3) is not subject to such a limited interpretation. Paragraph 19(B)(3) contains an unambiguous agreement that, if the license fees are impermissible, the State will pay to the Bands amounts equal to the past license fees already distributed to the State as well as amounts equal to the future license fees it collected. The Compacts do not provide for different remedies should the court determine the fees are impermissible because they are an indirect economic burden on the Bands as opposed to a tax. We simply cannot agree

that there is any possible restrictive meaning of Paragraph 19(B)(2) and (B)(3). Thus, we reject the State's offer of extrinsic evidence.

C. Primary Beneficiaries

Citing our *Cabazon II* decision, the State asks us to declare the Compacts invalid and unenforceable under IGRA because the racing associations and horsemen receive more revenue from the simulcast wagering than the Bands receive. Reasoning that we drew no distinction between the State and other persons who benefit from class III gaming on tribal lands, the State contends that the Bands are not the primary beneficiaries and thus that the Compacts are invalid.

The State misconstrues our analysis in *Cabazon II*. We did not erect an absolute bar to any Tribal-State compact under which any entity received more revenues from tribal gaming than the tribes. The primary beneficiary analysis in which we engaged extends no further than our consideration of whether IGRA preempts the State's regulatory scheme as to the disputed license fees. Recognizing that "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority," we analyzed the federal, tribal, and state interests in the State's collection of the license fees. *Cabazon II*, 37 F.3d at 433. In that context, we observed that the federal interest in ensuring that the Bands are the primary beneficiaries of the gaming operations was threatened by the State's collection of the

license fees. *Id.* However, our analysis did not end there. In order to resolve whether the license fees were impermissible, we considered both the Bands' interests and the State's interests. *Id.* at 434-35.

We are not convinced that, in this instance, a balancing of the competing federal, tribal, and state interests is required. IGRA "authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues." S.Rep. No. 100-446, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3073. Here, the State and the Bands agreed to the application of the state wager distribution system, whereas they did not agree to the imposition of the State licensing fee scheme.

Even if we were to apply the same competing interests analysis utilized in *Cabazon II*, and even if the federal interest in ensuring that the Bands are the primary beneficiaries of the gaming operations would be threatened by the wager distribution formula because the racing associations and horsemen receive greater percentages, our examination could not end there. Again, we would have to balance the Bands' interests and the State's interests. The wager distribution formula does not economically burden the Bands in the same manner as the license fees, because the Compacts do not provide an alternative distribution scheme under which the Bands are entitled to the percentages of the wagers due to the horsemen and racing associations under California law. Moreover, the State has a strong interest in maintaining the wager distribution formula. While the Compacts provided for the reimbursement to the State of regulatory costs and thus satisfied the State's interest without imposition of the

license fee, *Cabazon II*, 37 F.3d at 435, there is no alternative provision which would compensate the horsemen and the racing associations for providing the services upon which the success of the tribal gaming facilities – and the California horse racing industry – depend. Thus, under Cabazon II's primary beneficiary analysis, IGRA does not preempt the extension of the state wagering distribution formula to the tribal gaming facilities with the Bands' consent, even though the racing associations and the horsemen receive greater revenues from the Bands' simulcast wagering facilities than the Bands receive.

D. Illegal Slot Machines

Alleging that the Bands are conducting illegal gaming which is not authorized by the Compacts, the State asks us to enjoin the gaming as well as to declare the Compacts unenforceable, excusing the State from performance under Paragraph 19. The State alleges that the Bands are operating large-scale class III gaming operations and are offering banked and percentage games, including slot machines. Such gaming activities are not the subject of a Tribal-State compact. The State, however, has no jurisdiction over gaming activities that are not the subject of a Tribal-State compact.

IGRA limits the state's regulatory authority to that expressly agreed upon in a compact. Outside the express provisions of a compact, the enforcement of IGRA's prohibitions on class III gaming remains the exclusive province of the federal government. In *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir.1995), we held

that the State lacked jurisdiction to enforce its criminal laws against class III gaming activities on tribal lands unless the tribe has consented to the transfer to the State of criminal jurisdiction pursuant to a Tribal-State compact.

The State seeks to avoid the teachings of *Roache* by arguing that the Bands did consent to state regulation of the gaming at issue here by entering into the Compacts. Because the Compacts authorized only simulcast horse racing, the State reasons, the banked and percentage games are being conducted in violation of the Compacts. To reach this conclusion, the State argues that an implied promise not to engage in other class III gaming should be read into the Compacts, because class III gaming not authorized by a compact violates IGRA. It then asserts that 25 U.S.C. § 2710(d)(7)(A)(ii) authorizes it to seek an injunction. Section 2710(d)(7)(A)(ii) provides federal jurisdiction over "any cause of action initiated by a State . . . to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact. . . . "

The State, however, seeks to extend its regulatory authority beyond what is authorized by IGRA. As the district court noted, "the State would use the compacts as leverage from which to extend its regulatory control to other class III gaming not covered by the compacts." 4/26/96 order at 6. We decline to conclude that the Bands have impliedly consented to the extension of state regulatory authority to their tribal lands, beyond the express provisions of the Compacts, simply by entering into the Compacts.

To understand the states' limited regulatory authority, it is important to remember that, traditionally, Indian tribes were immune from state criminal and regulatory jurisdiction except to the extent that they consented to be governed by it. In extending state jurisdiction to Indian lands in IGRA, Congress was careful to balance the need for state enforcement of gaming laws with the federal and tribal interests in traditional tribal sovereignty. S.Rep. No. 100-446, at 5, 1988 U.S.C.C.A.N. at 3075. To preserve the long-established principle that the jurisdiction of the state and the application of state law do not extend to Indian lands absent the consent of the tribes, *id.*, tribal consent was a key component of IGRA. The Senate Committee on Indian Affairs explained in its statement of policy accompanying IGRA:

> Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities. The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does § 555 contemplate the extension of State jurisdiction or the application of State laws for any other purpose. Further, it is the Committee's intention that to the extent tribal governments elect to relinquish rights in a

> tribal-State compact that they might have otherwise reserved, the relinquishment of such rights . . . shall not be construed . . . as a general abrogation of other reserved rights or of tribal sovereignty.

Id. at 5-6, 1988 U.S.C.C.A.N. at 3075-76.

The State contends that the district court makes a mockery of the tribal-state compacting process by requiring the State to exact express promises not to engage in unauthorized gaming activities. We disagree. IGRA simply does not contemplate that a State will obtain unlimited regulatory authority over tribal gaming by entering a limited Tribal-State Compact. As the district court recognized:

> To infer a general covenant in the compacts by the tribes not to engage in gaming in violation of state law and IGRA, would be tantamount to finding a cession by the tribes of general regulatory authority to the State over class III Indian gaming in which the State's enforcement tool would be its threat to void or breach the compact. The text of IGRA, its legislative history and the historical context in which it was passed, all point to the opposite conclusion: that state authority over class III gaming reaches no further than the explicit terms of the tribal-state compacts.

4/26/96 order at 11. The Bands have not consented to state regulation of gaming activities other than that expressly covered in the Compacts. Because the slot machines and other banked and percentage games are not mentioned in the Compacts, the Bands have not breached

the Compacts. Further, under IGRA, the State has no jurisdiction to enjoin those gaming activities.

V. Intervention of SCOTWINC and the Racing Associations

On July 11, 1996, SCOTWINC, Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course, and the Los Angeles County Fair moved to intervene as defendants. SCOTWINC is an organization formed by the race track operators pursuant to California Business and Professions Code section 19608.2 to operate the satellite transmission system as well as the system for including amounts bet at offtrack wagering facilities in the parimutuel pools. The remaining Applicants are racetracks who conduct live horse races and who transmit a signal of the races to satellite wagering facilities.

We review de novo a district court's ruling on a motion to intervene as of right. *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir.1995). However, we review for an abuse of discretion whether such an application to intervene was untimely. *Id.*

We have set out a four-part test for intervention pursuant to Rule 24(a)(2): "(1) the motion must be timely; (2) the applicant must claim a 'significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that

interest; and (4) the applicant's interest must be inadequately represented by the parties to the action." *Id.* This test is interpreted broadly in favor of intervention.

The district court denied the Applicants' motion to intervene as untimely: "This motion comes very late in these proceedings and long after proposed intervenors should have known about any interest they may have in the outcome of this litigation." 7/11/96 order at 1-2. We have outlined three criteria for determining whether a motion to intervene is timely: "(1) the stage of the proceedings; (2) whether the parties would be prejudiced; (3) the reason for any delay in moving to intervene." *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th Cir.1996).

We do not reach the question of whether the Applicants have a sufficiently strong interest to justify intervention.[3] However, to determine whether their motion was timely, we must determine when their claimed interest was implicated. We believe that the interest they now assert was apparent early in this litigation. The Applicants explain that they had no interest in the litigation presented in *Cabazon I* and *Cabazon II*, because at that

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[3] Whether they have such an interest is questionable. As the district court observed in reviewing the State's affirmative defense of failure to join the associations as indispensable parties: "The State argues that taxing the racing association and horsemen and paying those monies to the tribes may violate state law. Even if it does, however, the State's contractual obligation to the tribes will remain, and the racing association and horsemen will be free to pursue any grievance they may have against the State in a separate action if they so choose." 4/26/96 order at 15.

stage, they understood the question presented to be only whether the fees are impermissible as a tax on the Bands. However, from the inception of this litigation, it was clear that the license fees at issue in this case are paid by the racing associations. Moreover, under the terms of the Compacts, of which the Applicants were aware, it is clear that the State and the Bands agreed that the State would continue to collect the fees from the racing associations, regardless of whether the court found them permissible under IGRA. Paragraph 19(B)(2) and 19(B)(3) clearly contemplate that either the State or the Bands would receive those fees.

Assuming arguendo that the Applicants had no immediate interest in the original litigation, surely they should have known what was in the offing after our October 1, 1994 decision in *Cabazon II* and after the district court, on July 12, 1995, ordered the Bands to file a new complaint to enforce Paragraph 19(B)(3). The Applicants must have been aware that the case might result in the State's continuing to collect money from them and then paying those revenues to the Bands. Nonetheless, the Applicants waited and watched. Instead of moving to intervene, they chose to rely on the State to protect their interests. In its November 21, 1995 answer, the State asserted that the Bands had failed to join indispensable parties – the racing associations. The district court, however, granted the Bands' motion to strike this affirmative defense on April 26, 1996, noting that "there is no indication that the racing association and horsemen have claimed any interest in this litigation, despite having had many years to do so." 4/26/96 order at 14. In that same order, the district court ordered the State to pay the

Bands. Thus, by the time the Applicants moved to intervene on July 3, 1996, the district court had already directed the State to pay the fees to the Bands, effectively resolving the dispute. Even if the court had granted the intervention, the Applicants would only have been able to participate in the motion for reconsideration.

Having made the strategic decision to rely on the State to advance their interests, the Applicants opted to delay moving to intervene in this litigation until long after they should have realized not only that their asserted interest was at stake, but also that their interest had diverged from the State's. They must now live with the ramifications of their delay. They waited too long, and their application for intervention was untimely. The district court's decision to block intervention that late in the litigation was not an abuse of discretion.

VI. Conclusion

The State and the Bands entered into Tribal-Compacts in which they agreed to submit the question of whether the license fees collected pursuant to California Horse-Racing Law are permissible under IGRA. Because the resolution of this dispute was essential to the completion of the Compacts, the parties also agreed to what would happen after the district court's decision. If the district court held that the fees are impermissible, the State would pay over to the Bands those fees, past and future. That contingency has occurred, and we hold the State to its agreement in the Compacts.

AFFIRMED.

WIGGINS, Circuit Judge, dissenting:

I respectfully dissent. I am unable to join the majority opinion because I am not convinced that we have jurisdiction of the Bands' efforts to enforce the terms of their Tribal-State compacts.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 1675, 128 L.Ed.2d 391 (1994) (citations omitted). Neither the Constitution nor any federal statute confers the federal courts with jurisdiction of the Bands' efforts to enforce Paragraph 19 of their compacts with the State of California. As a result, I would vacate the district court's judgment and remand with instructions to enter judgment in favor of the Bands on the issue presented by their original complaint.

The majority finds federal jurisdiction of the Bands' efforts to enforce the terms of the compacts pursuant to 28 U.S.C. §§ 1331 and 1362, which each confer federal jurisdiction of claims "arising under" the laws of the United States. Following the reasoning adopted by the district court, the majority concludes that such jurisdiction is "necessarily confer[red]" by the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701-21. However, as the majority implicitly recognizes, IGRA does not contain a provision which expressly grants federal jurisdiction of a dispute arising under a Tribal-State compact. Instead, the majority concludes that IGRA created federal jurisdiction over the Bands' claims because otherwise a state could make "empty promises" and the

Bands would be unable to enforce the terms of the agreement in federal court.

When this lawsuit was originally filed in district court, it presented an issue that was unquestionably within the jurisdiction of the federal courts. After our remand, however, the issues presented by this case transformed into something altogether different. No longer was the question whether the State's license fee was permissible under federal law; rather, the district court was asked to determine what rights the parties had under the terms of their Tribal-State compacts and to enforce those rights. As I understand the issues, IGRA is wholly irrelevant to this latter dispute. While IGRA created the Tribal-State compacting process, it does nothing to determine the compact-related rights and obligations of the Bands and the State. The answers to these questions necessarily lie in the language of the compact itself.

In fact, it was the language of the compacts which led to our decision in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir.1994) ("*Cabazon II*"), where we held that IGRA preempts the State from collecting its customary license fee on wagers placed at the Bands' offtrack betting facilities. My reading of that opinion convinces me that the State and the Bands could have formulated a Tribal-State compact which would have allowed the State to collect its license fee. Our analysis in *Cabazon II* relies heavily on Paragraph 19 of the Bands' compacts with the State to reach the conclusion that IGRA preempts the State from imposing its license fees on the Bands. *See id.* at 434. A compact without such a provision may not have created the preemption problem which led us to hold that the State could not collect its

customary license fee. The fact that the compact contains this provision does not mean that the Bands' present efforts to enforce the compacts arise under federal law.

The principal authority the majority cites in its jurisdictional analysis is abstract language from a footnote in the Supreme Court's decision in *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). I do not find this authority persuasive for two reasons. First, *Merrell Dow* dealt with a far different jurisdictional problem than the one presented by the present case. There, the plaintiffs alleged that the defendant's misbranding of a drug in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA") established a rebuttable presumption of negligence in their state law product liability action. The defendant attempted to remove the action to federal court, asserting that the plaintiffs' reliance on the defendant's violation of the FDCA created federal jurisdiction. The Supreme Court, holding that the district court did not have removal jurisdiction, found that the lack of a private right of action under the FDCA was dispositive as to whether the plaintiff's negligence arose under federal law. *Id.* at 817, 106 S.Ct. at 3236-37.

Our case is quite different. We must decide whether we have jurisdiction of a dispute about an agreement executed pursuant to a federal law (IGRA) that authorized two sovereigns (a state and an Indian tribe) to enter into such an agreement. As a result, I can't see how the core of *Merrell Dow's* analysis is germane to our resolution of this issue.

Second, although I recognize that footnote 12 of the *Merrell Dow* decision contains language which suggests

that an evaluation of the "nature of the federal interest" is at the heart of determining whether there is federal question jurisdiction, I do not believe the majority performs this evaluation correctly. The majority, at least in my view, is rather terse when it reaches the conclusion that the nature of the federal interest in this case is substantial enough to warrant concluding that IGRA confers jurisdiction of the Bands' compact enforcement claims to the federal courts. What is the federal interest in these claims? That the Bands would be unable to enforce the terms of the compacts? If so, what inference do we draw from the fact that Congress did not expressly provide for federal court jurisdiction of such a claim?

Thus, I turn to the core of the opinion's jurisdictional analysis: "We agree that Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to Indian tribes during good-faith negotiations of Tribal-State compacts, knowing that they may repudiate them with immunity whenever it serves their purpose." Opinion at 11043. I think that this argument – that Congress must have meant to create federal court jurisdiction of these claims – is flawed.

IGRA expressly confers federal jurisdiction of the following: (1) any cause of action initiated by an Indian tribe that the state refuses to enter into good faith negotiations for the purpose of entering into a Tribal-State compact; (2) any cause of action initiated by a state or Indian tribe to enjoin Class III gaming located on Indian lands and conducted in violation of a Tribal-State compact; and (3) any cause of action initiated by the Secretary of the Interior to enforce the mediation procedures which

go into effect if an Indian tribe and a state are unable to complete a compact. 25 U.S.C. § 2710(d)(7)(A)(i)-(iii).

Obviously, the Bands' efforts to enforce the terms of their compacts with the State does not fit any of these three categories. Congress's jurisdictional grant was both quite specific and quite narrow. Even though it granted federal jurisdiction of disputes arising during the compact negotiation process, Congress expressly chose not to confer federal jurisdiction of compact enforcement claims. The majority's conclusion that we have jurisdiction of the Bands' efforts to enforce the compacts ignores this undisputable indication of Congressional intent. In so doing, the majority ignores the possibility that Congress may have wilfully left jurisdiction of these claims to another forum.

In sum, I am not convinced by the district court's "IGRA is not so vacuous" argument. I think it is just as likely that Congress deliberately left jurisdiction of compact-related claims to the tribal and state court systems. Both the tribal and state court systems would have jurisdiction of an action to enforce the terms of the tribal-state agreements.[1] Given IGRA's silence, I think the holdings of the Supreme Court (*Merrell Dow* included) require us

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[1] A well-drafted Tribal-State compact could contain the necessary waivers of sovereign immunity to provide a forum in which the compacts could be enforced. Here, of course, the Bands could bring an action in a California Superior Court to enforce the terms of their agreement with the state. By doing so, of course, they would be waiving any claim of sovereign immunity.

to conclude that there is no federal question jurisdiction of the Bands' claims.

Similarly, I am not convinced by the majority's effort to distinguish *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir.1980). The majority subtly attempts to narrow *Gila River*'s holding by suggesting that it is limited to "run-of-the-mill" contract claims brought by Indian tribes. I cannot agree because I think *Gila River* is almost directly on point.

In *Gila River*, we held that the district court lacked jurisdiction of an Indian tribe's lawsuit against an architectural firm and building contractor for the alleged negligent design and construction of a youth center. The Indian tribe argued that federal common law should govern all Indian contracts, pointing out that federal statutes already regulated certain Indian contracts. We rejected this argument: We see no reason why commercial agreements between tribes and private citizens cannot be adequately protected by well-developed state contract laws. Nor has the tribe pointed out why national uniformity of rules governing these transactions would be desirable. Adoption of state law in such cases does not present a conflict with the federal policy or interest in protection of Indian tribes. Nor has any other court perceived the need for federal common law rules governing contract disputes between Indian tribes and non-Indians. The absence of the United States as a party to the litigation is also a factor in determining the need for a federal common law rule. *Id.* at 715 (citations omitted).

By its decision today, the majority does violence to the spirit of this decision. *Gila River* established that just

because an Indian contract must meet with certain requirements set forth in a federal statute does not mean that the federal courts have jurisdiction of any dispute arising under that contract. We noted in *Gila River* that the Indian tribe did not seek recovery for damage to their land, but rather sought "recovery of damages for failure to perform a construction contract." *Id.* at 714. Similarly, the Bands seek recovery for breach of the Tribal-State compacts, not violation of IGRA or any other federal law. Although IGRA regulates the formation of Tribal-State compacts to a certain degree, I see no reason for the federal courts to become the arbiter of any and all disputes that may arise out of such a compact.

The majority also suggests that jurisdiction of the Bands' compact enforcement claims can be found in § 2710(d)(3)(C)(v), which provides authorization for Tribal-State compacts to provide remedies for breach of contract. This provision, however, says nothing about federal court jurisdiction of these breach of contract claims. Although the majority is correct that the parties could agree to waive their respective immunities, a long line of authority establishes that federal jurisdiction may not be conferred by such an agreement if it does not independently exist. *See, e.g., Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir.1988) ("The parties have no power to confer jurisdiction on the district court by agreement or consent."); *see also* E. Chemerinksy, *Federal Jurisdiction* § 5.1, at 249 (2d ed. 1994) ("[F]ederal court jurisdiction cannot be gained by consent of the parties.").

Finally, as an alternative basis for jurisdiction, the majority asserts we have jurisdiction because the Bands

are seeking to recover money taken by the State in violation of federal law. I cannot agree. As I view it, the Bands seek nothing more than the enforcement of their Tribal-State compacts. Paragraph 19 of the compacts calls for the State to pay the Bands the disputed license fees as a result of our decision in *Cabazon II*, where we held that the State's license fees were preempted by federal law. Despite the fact that our resolution of that question was based on federal law, the Bands' efforts to obtain a judgment ordering the State to pay over the disputed license fees do not "arise under" the laws of the United States. Instead, they rely only on the terms of their Tribal-State compacts.

We federal judges must jealously protect our increasingly limited resources by ensuring that we adjudicate only those matters that we are authorized to hear by Congress and the Constitution. Here, we unquestionably had federal question jurisdiction of the legal issue presented in the Bands' original complaint, viz., whether the State's license fee on off-track betting was permissible under IGRA. However, when the district court failed to execute our instructions "to enter summary judgment for the Bands," *Cabazon II*, 37 F.3d at 435, this case began to present new and different issues of which we do not have jurisdiction. As a result, I respectfully dissent from the majority's decision to affirm the district court's order directing the State to pay the Bands' accumulated and future license fees.

CABAZON BAND OF MISSION INDIANS, and the Sycuan Band of Mission Indians,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al., Defendants.

No. Civ. S-90-1118-DFL.

United States District Court,
E.D. California.

March 31, 1992.

Glenn M. Feldman, O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, P.A., Phoenix, Ariz., for Cabazon Band of Mission Indians.

Barbara E. Karshmer, Inc., George Forman, Gary P. Harrington, Alexander & Karshmer, Berkeley, Cal., for the Sycuan Band of Mission Indians.

Daniel E. Lungren, Atty. Gen., Cathy Christian, Deputy Atty. Gen., Sacramento, Cal., for defendants.

ORDER

LEVI, District Judge.

The Cabazon and Sycuan Bands of Mission Indians (the "Tribes") seek a determination that the State of California cannot impose license fees on its on-reservation betting facilities for simulcast horse racing. The Tribes argue that the license fees are a direct tax on them that is barred by the Indian Gaming Regulatory Act ("IGRA") and the doctrine of tribal sovereign immunity. California asserts that the license fees are permissible under IGRA

because the fees do not constitute a direct tax on the Tribes. Both parties move for summary judgment. The State's motion is granted and the Tribes' motion is denied.

I

The Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701-2721, authorizes Indian tribes to conduct gaming activities that are permitted in the state in which the tribes' lands are located. The purpose of permitting Indian tribes to run gaming operations is to promote tribal economic development, self-sufficiency, and strong tribal governments. 25 U.S.C. § 2702(1). IGRA classifies gaming into three different categories and permits varying degrees of tribal, state, and federal regulation. Class I gaming, which involves social games for prizes of minimal value, is within the exclusive jurisdiction of the Indian tribes and is not subject to state or federal regulation. 25 U.S.C. §§ 2703(6) and 2710(a). Class II gaming, which includes bingo and some card games, is within the jurisdiction of the tribes, but is also subject to federal regulation. 25 U.S.C. § 2703(7)(A)-(D), § 2710(a)(2). Class III gaming, which includes all gaming not covered by Classes I & II, is permissible only if it is: (1) authorized by a resolution of the tribe's governing body; (2) approved by the Chairman of the National Indian Gaming Commission; (3) located in a state that permits that type of gaming; and (4) conducted pursuant to a tribal-state compact. 25 U.S.C. § 2710(d)(1). Off-track betting at simulcast wagering facilities is Class III gaming under IGRA. (Stipulated Statement of Facts ("SSF") at ¶ 10.)

Unlike Class I and II gaming, IGRA provides that Class III gaming will be subject to extensive state regulation. The states have a greater interest in regulating the more sophisticated types of gaming covered by Class III because most participants will be non-Indians, and there is a significant risk of infiltration by criminal elements. *See* 134 Cong.Rec. H8146-01. Because of the importance of the states' interests affected by Class III gaming, and because of the extensive state regulation of Class III gaming, IGRA requires that tribes and states negotiate tribal-state compacts which govern many aspects of the conduct of the gaming.

IGRA contemplates a highly flexible compact negotiation process, in which the states and tribes may agree upon a multitude of issues related to the conduct of Class III gaming. IGRA provides that tribal-state compacts may contain provisions covering, inter alia, questions such as the application of criminal and civil laws related to gaming regulation, allocation of jurisdiction over criminal and civil matters, state taxation to cover costs of regulation, and remedies for breach of contract. *See* 25 U.S.C. § 2710(d)(3)(C)(i)-(vii).[1]

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[1] The Act provides for jurisdiction in the federal district courts to entertain a suit by an Indian tribe when the tribe and the state are unable to negotiate a compact. In such actions, the tribe must introduce evidence that the state did not respond to the tribe's request to negotiate a compact or did not respond in good faith. 25 U.S.C. §§ 2710(d)(7)(A) and (7)(B). Upon the introduction of such evidence, the burden of proof is on the state to prove it negotiated in good faith:

> In determining . . . whether a State has negotiated in good faith, the court – (I) may take into account the

II

California permits horse racing enthusiasts to bet on races both at the track where the races are conducted and at off-site facilities. Off-track betting is conducted at facilities that receive a simultaneous satellite transmission of live races. The off-track facilities are electronically connected to the originating tracks so that the bets placed at the off-track facilities are part of the parimutuel[2] betting pool. (SSF at ¶ 12.) The California Horse Racing Board approves the off-track betting facilities, which are known as "simulcast" or "satellite" wagering facilities. *Id.* Racing associations, composed of the operators of live races, can form organizations to transmit the audio-visual signal and administer the parimutuel betting operations at simulcast facilities. *Id.*

California has an extensive statutory scheme for regulating and taxing horse racing and off-track betting at simulcast satellite wagering facilities. The statutory plan

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> public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and (II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

25 U.S.C. § 2710(d)(7)(B)(iii).

In this case, plaintiffs do not argue that the State has acted in bad faith and thus do not invoke 25 U.S.C. § 2710(d)(7)(A) to establish the court's jurisdiction. The court has jurisdiction of this action under 28 U.S.C. § 1362, which provides for federal court jurisdiction over all civil actions involving Indian tribes.

[2] In pari-mutuel betting, those who bet on the winner share the total stakes minus a small percent for the management.

provides for the distribution of all money wagered that is not paid out to bettors. The money is allocated in predetermined percentages to California, simulcast facility operators, racing associations composed of operators of live races, and various other public and private entities. In order to finance the cost of regulation by the state horse racing board and to raise revenues, California requires that between one-and-a-half and four percent of the amount wagered at simulcast facilities be paid to the state as license fees. Cal.Bus. & Prof.Code § 19611. Additional license fees payable to the state are provided for by sections 19606.5 and 19606.6. The racing associations are responsible for paying the license fees to California. Cal.Bus. & Prof.Code §§ 19605.7(i) & 19605.71(d). Any monies left over are paid to the racing associations and the horsemen who participate in the races. Cal.Bus. & Prof.Code §§ 19605.8 & 19606.

III

The Tribes entered into compacts with California to operate simulcast wagering facilities on their reservations, pursuant to 25 U.S.C. § 2710(d).[3] The compacts have been approved by the Assistant Secretary of the Interior and published in the Federal Register, as required by 25 U.S.C. § 2710(d)(2)(B). (SSF at ¶¶ 21-22.) Both Tribes are presently operating simulcast wagering facilities on their respective reservations under agreements with the racing associations. SSF at ¶ 23.

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[3] The parties agree that the lands of both Tribes' reservations are "Indian lands" within the meaning of 25 U.S.C. § 2703(4).

The Tribes are entitled to keep 2.33% of the total wagers placed at their facilities, pursuant to their compact with California. All off-track facilities retain 2% as a commission, and pay .33% to the local government entity. The tribes keep both the 2% ordinarily payable to the facility operator, and the additional .33% as the local government entity. (SSF at ¶ 24.) Thus, the Tribes receive the same revenue paid to non-Tribe simulcast operators plus the same revenue paid to non-Tribe local governments.

The Cabazon Band's simulcast wagering facility generated nearly $300,000 in license fees for California between March 1, 1990, and February 28, 1991. (SSF at ¶ 25.) The license fees were collected from the racing association that operated the live race, based on the amount wagered at the reservation. The state horse racing board's actual costs in monitoring the Cabazon Band's operation during this period totaled $13,808. (SSF at ¶ 32.) The Cabazon Band itself retained $217,000 during the same period. (SSF at ¶ 26.)

From November 1, 1990 to March 31, 1991, the Sycuan Band's simulcast wagering facility generated over $440,000 in license fees for the State. (SSF at ¶ 27.) Again, the license fees were not collected directly from the Tribe but from the racing associations, based on the revenues generated by the simulcast facility located on the reservation. The horse racing board's actual costs in monitoring the Sycuan Band's operation during this period totaled $8,895. SSF at ¶ 33. The Sycuan Band itself retained $318,000 during the same period. SSF, ¶ 26.

While negotiating the compacts, the parties disagreed about whether California has jurisdiction to collect its license fee based on revenues generated at the Tribes' simulcast operations. As noted above, such fees are collected by law from the racing associations, based on wagering revenues – including simulcast wagers – generated by the associations' races. *See* Cal.Bus. & Prof.Code §§ 19605.71(a)-(b), 19606.5, and 19606.6. The parties agree that these fees are taxes, even though they are called "license fees." SSF at ¶ 16. The Tribes argue that the license fees are impermissible because they reduce the amount that the Tribes would collect from the simulcast enterprise, and so constitute a direct tax.[4] California asserts that because the license fees are paid by the racing associations, the racing associations are the entities burdened by the tax, not the Tribes. The Tribes and California agreed that the Tribes would seek judicial resolution of this question, which is the sole issue before the court.

IV

The first source of guidance as to whether the license fees are permissible is IGRA itself. The Tribes contend that IGRA's extensive regulatory provisions preempt the State's jurisdiction to tax Indian gaming. IGRA explicitly

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[4] During the course of negotiating the compacts, California and the Tribes agreed that if there is a final judicial determination that the license fees are impermissible under IGRA, all license fees previously collected by California will be returned to the Tribes. In the future, the Tribes would be entitled to receive "an amount equivalent to the state license fee from all wagers at the [Tribes'] simulcast wagering facility." (Tribal Compacts at ¶ 19(A)(3).)

addresses what type of direct state taxation is permissible. Tribal-state compacts may provide for a State tax on Indian gaming activities to the extent necessary to raise revenues to cover the costs of regulating the gaming. 25 U.S.C. § 2710(d)(3)(C)(iii). The compacts may also permit the Tribes to tax gaming "in amounts comparable to amounts assessed by the State for comparable activities." 25 U.S.C. § 2710(d)(3)(C)(iv). IGRA also provides that:

> Except for any assessments that may be agreed to [to permit the state to recover its costs of regulation], nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . engag[ing] in a class III activity.

25 U.S.C. § 2710(d)(4). These subsections, read together, constitute a prohibition on direct taxation of revenues generated by tribes, other than that necessary to reimburse the state for the cost of its regulatory activities. This prohibition is echoed by IGRA's instruction that courts shall "consider any demand by the State for *direct* taxation of the Indian tribe . . . as evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii)(II) (emphasis added).

However, IGRA consistently speaks only to *direct* taxation. The dispute in the present case is over whether the license fees, which are levied on the racing associations and which affect the Tribes only indirectly, are an impermissible burden on the Tribes. The language of the Act is silent as to the legality of a uniform tax imposed on non-Indian entities who contract with Indian tribes. Congressional silence "no longer entails a broad-based immunity from taxation for private parties doing business with

Indian tribes." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S.Ct. 1698, 1707, 104 L.Ed.2d 209 (1989).

Because the language of the statute does not directly address the issue, it is appropriate to consult the legislative history for guidance. The legislative history of the Act strongly suggests that Congress did not intend to preempt the license fees the State seeks to collect from the racing associations. A primary purpose of IGRA was to create an arena in which Indian tribes could compete on an equal footing with non-Indian entities, "to achieve a fair balancing of competitive economic interests." Senate Report No. 100-446 at U.S.Code Cong. & Admin.News 1988, p. 3071. The Act seeks to provide "free market competition" between Indian gambling operations and other State-licensed gaming enterprises. *Id.* at 3083.

In addition, the Act seeks uniformity in the regulation of Indian and non-Indian gaming activities:

> This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied.

Id. at 3076.

Finally, through the compact process, Congress sought to leave to the states and the tribes the authority to adjust their mutual interests in Class III gaming. Congress recognized revenue collection as a legitimate state interest:

> State and Tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to

> conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. . . . A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens.

Id. at 3083; *see id.* at 3084 (states may reject Indian gaming if negative economic consequences outweigh benefits). Congress' intent to establish an equal footing for competing tribal and non-Indian gaming enterprises, to provide for uniform regulation, and to permit the States to achieve certain economic goals indicates that, except for direct state taxation, Congress did not intend to preempt the state tax at issue here. California seeks to treat revenue generated by racing associations on Indian lands in precisely the same fashion as revenue generated on non-Indian lands. Such a tax furthers the twin goals of equality and uniformity in regulation. Finally, preemption would deprive the State of substantial revenues traditionally collected from pre-existing racing association activities. Congress intended that the states and tribes would reach some accommodation on this issue through the compact process; it did not intend to bar the State from collecting a generally imposed tax on racing associations for all of their activities whether on Indian or non-Indian lands.

In short, based on the Act's silence as to indirect taxation, and Congress' intent that Class III tribal gaming be treated equally to non-Indian gaming, the court finds that IGRA does not preempt the tax at issue here.

V

The Tribes argue that even if IGRA does not preempt the State's licensing fees, the tax is still invalid as an impermissible intrusion on the Tribes' sovereignty. The Tribes argue that under general principles of federal Indian law, the tax is preempted. Although the strict prohibition against direct taxation of Indian tribes is well settled, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992), the more difficult area for the federal courts has been taxation of entities and individuals who conduct business with Indian tribes. "[F]ederal pre-emption is not limited to cases in which Congress has expressly – as compared to impliedly – pre-empted the state activity." *Cotton Petroleum*, 109 S.Ct. at 1707. In order to determine when there is an implied preemption of state regulation or taxation, the courts have developed a balancing test which weighs the conflicting state, federal and tribal interests. *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir.1989), *cert. denied*, 494 U.S. 1055, 110 S.Ct. 1523, 108 L.Ed.2d 763 (1990) (*citing Cotton Petroleum*, 109 S.Ct. at 1707.) The following factors are relevant to the balancing of these interests to determine if such taxes impermissibly interfere with federal or tribal interests: (1) the economic and administrative burden on the tribe; (2) the extent and cost of state regulation, and state services provided; and (3) the nature of the taxed tribal activity. The court will review each of these factors in turn as it relates to the present dispute.

VI

The fiercest point of disagreement between the Tribes and California is over the economic impact of the license fees on the Tribes. California argues that because the state statutory scheme provides for the distribution of any monies not retained by the off-track betting facilities or paid to the State, the Tribes have no legal right to the license fees even if California is barred from collecting them. If the Tribes as simulcast operators have no entitlement to the fees, there is no economic burden to the Tribes of having a third party, here the racing associations, turn over the fees to California.

In response, the Tribes rely on the State-Tribal compacts, which provide that if the license fees are found to be an impermissible tax, the Tribes will receive fees collected in the past, and will be entitled to collect future license fees. The Tribes argue that because they will be deprived of additional revenue if the license fees are upheld by this court, they are burdened economically by the fees.

The court is not in agreement with the Tribes' circular view of the effect of the State-Tribal compacts. In the compacts, California conceded only that if the court finds the tax invalid, it would pay over to the Tribes any monies collected and would allow the Tribes to retain that revenue in the future. The State plainly did not concede that the tax imposed a burden on the Tribes. The compacts contemplate that the possible invalidity of the tax will be determined by considering factors independent of any settlement agreement the parties may have as to the effect of the court's ruling. Any other approach

could lead to inconsistent results, depending on the particular settlement agreement between the State and the Tribe. The only question for the court is whether the license fees burden the Tribes, and not whether a decision adverse to the Tribes could have economic consequences because of a settlement agreement. In evaluating the economic impact of the license fees, the court looks to the state provisions for assigning the right to receive revenues from the off-track facilities, as well as any negative effect on the Tribes' ability to compete with non-Indian facilities.

State law places the duty to pay the license fees on the racing associations.[5] Cal.Bus. & Prof.Code §§ 19605.7(i) & 19605.71(d).[6] If California cannot tax the revenues derived from betting at simulcast facilities located on the Tribes' lands, these revenues would be distributed 50% to the racing associations and 50% as purses to horsemen who participate in the races. Cal.Bus. & Prof.Code §§ 19605.8 & 19606. Because the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the license fees do not impose an economic burden on the Tribes.

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[5] Although the legal incidence of the tax is not dispositive, the Supreme Court has upheld a regulation requiring Indian tribes to collect sales tax where the legal incidence of the tax fell on the purchasers, and not on the tribes. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481, 96 S.Ct. 1634, 1645, 48 L.Ed.2d 96 (1976).

[6] These sections provide: "Notwithstanding any other provision of law, a racing association is responsible for the payment of the state license fee as required by this section."

Furthermore, payment of the license fees does not harm the Tribe's economic interest by making gaming activities more expensive and less attractive to the Tribe's patrons. There is no evidence before this court that payment of the tax reduces the Tribes' ability to market their gaming operations. *Compare Crow Tribe of Indians v. Montana*, 819 F.2d 895, 899 (9th Cir.1987), *aff'd*, 484 U.S. 997, 108 S.Ct. 685, 98 L.Ed.2d 638 (1988) (coal tax imposes economic burden on tribe by increasing costs to coal producers and reducing royalties paid to tribe). The license fees do not render betting at the Tribes' operations less profitable for the bettors – indeed, there is no evidence whatsoever that the Tribes's ability to attract customers has been adversely affected by payment of the license fees. In the absence of the license fees, the tribes would not be able to offer bettors a higher payout on their wagers because the amount winners receive is determined by total wagers in the betting pool.

The Supreme Court has also recognized administrative burden as a factor in determining whether Indian tribes can be required to collect taxes when the legal incidence of the tax falls on the consumer of the tribes' product. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 911, 112 L.Ed.2d 1112 (1991). The prohibition against imposing direct taxes on Indian tribes "does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." *Id.* In the present case, there is no additional administrative burden placed on the Tribes by collection of the monies ultimately used by the racing associations to pay the license fees. Under state law, the Tribes must turn over to the racing associations all monies received

from wagering except for the percentage they are entitled to as simulcast facility operators.

In sum, there is no economic burden placed on the Tribes by the license fees because they do not pay the fees, and the fees do not make their product less attractive, thereby reducing the profitability of the tribal operations. Additionally, there is no administrative burden imposed by the requirement that the Tribes collect the wagers which are later used by the racing associations to pay the license fees. The absence of economic and administrative burdens weighs in favor of finding the license fees a permissible indirect tax on the activities of the Tribes.

VII

The extent and cost of state regulation as well as the nature of the services provided by California all favor permitting the license fees. California has an extensive state regulatory scheme for off-track betting, expends funds to regulate the taxed activity, and provides services directly related to the taxed activity.

The extent of state regulation is an important factor in determining the state's ability to tax the regulated activity. Where states have attempted to tax tribal activity and have not otherwise regulated the activity, the federal courts have stricken the proposed tax. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), the Court held that where the state does not regulate the taxed activity and has no duties or obligations to the tribes related to the taxed activity, state taxation is preempted. Furthermore, the Court noted in

invalidating the tax that it was undisputed that the economic incidence of the tax would ultimately fall on the tribes. Similarly, in *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982), the Court refused to permit New Mexico to impose a tax related to school construction on the tribe's reservation:

> Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education – a scheme which has "left the State with no duties or responsibilities." Nor has the State asserted any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax.

Id. at 843, 102 S.Ct. at 3401 (*quoting Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 691, 85 S.Ct. 1242, 1246, 14 L.Ed.2d 165 (1965)); *cf. Hoopa Valley*, 881 F.2d at 660 (timber yield tax impermissible where state has "no role" in regulating sale of tribal timber).

Where there is active state regulation, in contrast, the Supreme Court has permitted taxation of the regulated activity. A severance tax imposed on production of oil and gas by non-Indian lessees of wells on tribal land was upheld in *Cotton Petroleum*, in part because of state involvement in regulating oil and gas production. The Court distinguished *Ramah* and *Bracker*, noting that New Mexico provided extensive services to the tribes related to the oil and gas production, and that no state services had been provided in *Ramah* and *Bracker*. The Court also distinguished those cases because it found that the tax was not an economic burden on the tribe, unlike the taxes

in *Ramah* and *Bracker*, which reduced the profitability of the tribes' activities.

The *Cotton Petroleum Court* also rejected the tribe's argument that the tax was impermissible because the value of the state services received by the tribe was considerably less than the revenue the state received from the disputed tax. The Court first noted that it was not possible to accurately value the benefit of the services provided by New Mexico to the tribes because of the intangible benefits of membership in the state community. Second, the Court found "no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer – or by those living in the community where the taxpayer is located – must equal the amount of its tax obligations." *Id.* 109 S.Ct. at 1714 (*citing Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n. 21, 107 S.Ct. 1232, 1245 n. 21, 94 L.Ed.2d 472 (1987)).

In light of the principles of *Ramah*, *Bracker*, and *Cotton Petroleum*, the court finds that the extent of the State's regulation of Class III gaming favors upholding the license fees. Unlike *Ramah* and *Bracker*, there is extensive state regulation of horse racing and simulcast off-track betting. The level of the state regulation here far exceeds that in *Cotton Petroleum*, which was apparently limited to regulating "the spacing and mechanical integrity of wells located on the reservation." 109 S.Ct. at 1712. California has a statutory plan regulating in minute detail the allocation of revenues and expenses associated with horse racing and off-track betting.

Furthermore, the fact that the cost to California of regulating the off-track betting facilities may be less than the revenues it derives from the license fees does not invalidate the fees. As in *Cotton Petroleum*, the revenues here far exceed the itemized costs of regulation. Additionally, as in *Cotton Petroleum* there are many costs borne by the State that are of a general nature and which cannot be assigned to any particular gambling operation. The presence of horse racing in California requires the State to support additional law enforcement and tax collection bureaucracies as well as establishing and operating the extensive administration that oversees the horse racing industry. Even if the state revenues were disproportionately larger than state expenses, the lack of proportionality does not make the tax an impermissible burden on the tribes. *See Cotton Petroleum*, 109 S.Ct. at 1714.

VIII

When the nature of the activity that a state seeks to tax is unrelated to traditional Indian activity and consists of taking advantage of an exemption not available to non-Indians, an indirect tax will be upheld. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court upheld a tax on cigarettes sold on Indian lands to non-Indians. In evaluating the legitimacy of the tax, the Court examined the source of the value being marketed by the tribes:

> It is painfully apparent that the value marketed by the smokeshops to person coming from outside is not generated on the reservations by activities in which the Tribes have a significant

> interest. What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation.

Id. at 155, 100 S.Ct. at 2082. Because the value was not generated by the tribes, the Court found that the tribes' interest in raising revenue was weak. The tribal interest "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Id.* at 156-57, 100 S.Ct. at 2083.

The tribal interest in raising revenue is stronger where the value being marketed is gaming, as in the present case, than it is where the tribes are seeking to take advantage of a tax exemption, as in *Colville*. Gaming is a major source of employment on Indian reservations, and tribes make large investments in building and maintaining gaming facilities. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). In *Cabazon*, the Supreme Court distinguished *Colville*, noting the extent of the tribes' efforts to attract customers to their gaming facilities:

> The Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide.

Cabazon, 480 U.S. at 219, 107 S.Ct. at 1093.

Applying the principles of *Colville* and *Cabazon* to the present case, the court finds that the nature of the value being marketed is a neutral factor. Although the Tribes here, as in *Cabazon*, have an extensive commitment to

operation of their gaming operations, this case is different because it involves simulcast horse racing, not the card games and bingo at issue in *Cabazon*. Plainly card games and bingo conducted in buildings constructed on Indian land offer a value generated on the reservation. However, the value of parimutuel betting on simulcast horse racing is derived largely from an activity – live horse racing – occurring outside the reservation and operated by non-Indian racing associations. Because the betting occurs on Indian land, but is dependent on events occurring elsewhere, this factor is neutral in balancing tribal, state, and federal interests.

IX

The court holds that the license fees California collects from the horse racing associations which broadcast their races to on-reservation betting operations are neither preempted by IGRA nor a violation of the Tribes' sovereign immunity. Although IGRA addresses the permissibility of direct taxes, there is no explicit preemption of the indirect tax imposed by the license fees. IGRA's legislative history suggests that Congress did not intend to preempt the indirect tax at issue here. In evaluating whether Congress has impliedly preempted the license fees through the sovereign immunity accorded to the Tribes, the court has balanced the strength of the federal, tribal and state interests involved in Class III gaming operations in California. Because the taxes are collected from the horse racing associations and do not reduce the profitability of the tribal gaming operations, there is no economic burden on the Tribes. California is an active

participant in regulating horse racing and off-track betting, and has not abandoned this area to the federal government or the tribes. Finally, the nature of the off-track betting is a mix of on-reservation and off-reservation activity. After weighing these factors, the court holds that California may tax the racing associations by imposing license fees on all the revenue generated by simulcast wagering, including wagering at the Tribes' on-reservation simulcast facilities.

The Clerk of the Court is directed to enter judgment in favor of the State of California.

IT IS SO ORDERED.

CABAZON BAND OF MISSION INDIANS, a federally recognized Indian Tribe; Sycuan Band of Mission Indians, Plaintiffs-Appellants,

v.

Pete WILSON, Governor, et al.,. Defendants-Appellees.

No. 92-15751.

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Oct. 5, 1993.
Opinion Filed May 9, 1994.
Opinion Withdrawn Oct. 6, 1994.
Decided Oct. 6, 1994.
Appeal from the United States District Court for the Eastern District of California.

Before: BOOCHEVER, THOMPSON, and O'SCANNLAIN, Circuit Judges.

ORDER

The petition for rehearing is GRANTED.

The opinion filed on May 9, 1994 is hereby WITHDRAWN and the attached opinion shall be filed in lieu thereof.

OPINION

O'SCANNLAIN, Circuit Judge:

We consider the power of the State of California to tax offtrack betting activities on Indian reservations.

I

Plaintiffs Cabazon Band of Mission Indians and Sycuan Band of Mission Indians ("the Bands") conduct

simulcast wagering (offtrack betting) on their reservations to raise tribal revenue. Such activities are regulated by the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701-2721, which categorizes Indian gaming into three classes; simulcast wagering is Class III gaming. Under IGRA, states and Indian tribes must negotiate compacts to regulate the terms under which Class III gaming may be conducted. Here, California and the Bands entered into compacts for the Bands to operate their simulcast wagering facilities.

Southern California Off Track Wagering, Inc. ("SCOTWINC") is a quasi-governmental organization of racing associations formed under California law. Cal.Bus. & Prof.Code § 19608.2. Both Bands entered written agreements with SCOTWINC and the racing associations which conduct the live horse races. SCOTWINC arranges for the racing associations' broadcast signals to be transmitted to the Bands' on-reservation simulcast wagering facilities. SCOTWINC also accepts the wagers and handles the cash at the Bands' facilities.

Under the terms of the compacts between California and the Bands, SCOTWINC distributes to the Bands 2.33% of the money wagered at their simulcast wagering facilities. Two percent is the typical commission offered by racing associations for operating a satellite wagering facility; the remaining 0.33% is paid to the Bands in their deemed "local government" capacity. The Bands contend that an additional amount should be distributed to them rather than remitted to the State of California measured by the proportion of license fees payable on wagers placed at their facilities.

SCOTWINC remits to the State the license fee imposed under Cal.Bus. & Prof.Code sections 19605.71(a) and (b), 19606.5 and 19606.6, which is a percentage of all wagers placed. Different percentages are paid based on the location of the wager (ontrack or offtrack), the type of wager (conventional or exotic), and the type of race (breed of horse and distance). Part of this license fee is based on wagers placed at Indian wagering facilities. California concedes that the license fee is a tax. The Bands assert that part of the license fee based on wagers placed at Indian facilities is a tax prohibited under both IGRA and traditional grounds of federal preemption, and should be payable instead to the Bands.

Because the State of California and the Bands could not agree whether the State had the power to collect the license fee based on wagers at Indian facilities, the negotiated compacts specifically state that the Bands will sue the State for declaratory relief. After the Bands brought suit, both sides moved for summary judgment, which the district court granted for the State. *See Cabazon Band of Mission Indians v. California*, 788 F.Supp. 1513 (E.D.Cal.1992). The Bands timely appealed.

II

The Bands first contend that the State's license fee is impermissible under IGRA. The Bands argue that IGRA expressly prohibits the taxation of both Indian Bands and those entities authorized by such Bands to engage in Class III gaming activities. In support of their contention, the Bands point to section 2710(d)(4) of IGRA, which provides that "nothing in this section shall be interpreted

as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." 25 U.S.C. § 2710(d)(4).

The Band's reasoning is flawed because it equates the failure to confer authority to tax with a prohibition to tax. We objected to this kind of statutory construction in *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914, 923 (9th Cir.1992), *vacated on other grounds*, 509 U.S. 43, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). In that case, the plaintiffs sought an injunction requiring the admission of aliens into the United States. Opposing the injunction, the government cited 8 U.S.C. § 1255(a)(3)(C), which states "[n]othing in this section shall be construed as authorizing" petitioners' admission into the country. Although we affirmed the district court's denial of the injunction, we explicitly stated that the statute did not provide a basis for our affirmance because, "although the statute does not authorize admission to the United States, it does not prohibit admission either." *Catholic Social Servs., Inc.*, 956 F.2d at 923.

Similarly, section 2710(d)(4) is not on its face a prohibition of state taxation. The absence of an express prohibition on the State's power to tax does not end our inquiry, however.

III

The Supreme Court has, as a matter of federal Indian law, explicitly "rejected the proposition that in order to find a particular state law to have been preempted by

operation of federal law, an express congressional statement to that effect is required." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 100 S.Ct. 2578, 2584, 65 L.Ed.2d 665 (1980). Thus, we must analyze whether Congress has, by implication, acted to preempt the extension of state authority onto Indian reservations in this instance.

In determining whether federal law preempts a state's authority to regulate activities on tribal lands, courts must apply standards different from those applied in other areas of federal preemption. "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334, 103 S.Ct. 2378, 2386, 76 L.Ed.2d 611 (1983). In balancing these federal, tribal, and state interests, no specific congressional intent to preempt state activity is required; " 'it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy.' " *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 (9th Cir.1987), *aff'd*, 484 U.S. 997, 108 S.Ct. 685, 98 L.Ed.2d 638 (1988) (quotation omitted). Furthermore, "ambiguities in federal law are, as a rule, resolved in favor of tribal independence." *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 177, 109 S.Ct. 1698, 1708, 104 L.Ed.2d 209 (1989).

We analyze the federal, tribal, and state interests in turn.

A

The federal interests before us are clearly set forth in the language of IGRA itself. Intended to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," IGRA seeks to "ensure that the Indian tribe is the *primary beneficiary* of the gaming operation." 25 U.S.C. § 2701(1) and (2) (emphasis added).

The State's current licensing fee threatens this federal objective. Between March 1, 1990 and February 28, 1991, the State collected $292,075 in license fees from wagers handled at the Cabazon Band's simulcast wagering facility. During that same period, the Cabazon Band earned $217,386. Similarly, between November 1, 1990 and March 3, 1991, $440,175 in license fees were deducted and distributed by SCOTWINC to the State from wagers placed at the Sycuan Band's facility. The Sycuan Band received only $318,743. In both cases, the State benefited from the tribal gaming operation to a considerably greater extent than the Bands. Neither Band would be described as a "primary beneficiary." Such an outcome contravenes the purposes of IGRA. *See White Mountain Apache Tribe*, 448 U.S. at 149, 100 S.Ct. at 2586-87 (concluding that state was preempted from imposing fuel tax on a non-Indian logging company harvesting timber on tribal land because "the taxes would threaten the overriding federal objective of guaranteeing Indians that they 'will receive . . . the benefit of whatever profit [the forest] is capable of yielding.' ").

B

The State's licensing scheme also undermines tribal interests. We agree with the district court that the license fee imposed falls directly upon the racing association, and not the Bands.[1] To say that the fee is a direct tax only upon the racing associations is not to say that the Bands are not economically burdened by such fee, however. Discussing federal Indian preemption, the Supreme Court in *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 844 n. 8, 102 S.Ct. 3394, 3401 n. 8, 73 L.Ed.2d 1174 (1982), declined to adopt a "legal incidence test," under which "the legal incidence and not the actual burden of the tax would control preemption inquiry." The Court instead focused on the fact "that the economic burden of the asserted taxes would ultimately fall on the Tribe," even though the legal incidence of the tax was on the non-Indian logging company. *Id.*

Here, as in *Ramah Navajo*, the Bands bear the actual burden of the license fee. The district court reached a

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[1] Despite the Bands' assertions to the contrary, we conclude that the Bands are not directly burdened by the tax before us. The Bands do not pay any of their commission to the State, do not write a check to the State, and do not have any direct contact with the State with respect to the license fee. The Bands' argument that the tax is imposed directly on the Bands because California law imposes different percentage license fees for wagers made at satellite wagering facilities is not persuasive. *See* Cal.Bus. & Prof.Code § 19605.3, 19605.71, 19610. The statutes the Bands cite also establish different tax rates for different breeds of horses and distances. Cal.Bus. & Prof.Code § 19605.71. This, of course, does not mean that the breed of horse pays a direct tax. Place of wager and breed of horse are simply variables in the tax formula.

conclusion opposite from our own, reasoning that under California law, surplus revenue is to be divided equally between the racing association and the horsemen. Cal.Bus. & Prof.Code § 19605.8 & 19606. Thus, the district court concluded, if the racing association did not pay that part of the license fee based on wagers at Indian satellite facilities, the Bands would not be entitled to the money saved. As the court explained, "[b]ecause the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the license fees do not impose an economic burden on the Tribes." *Cabazon Band*, 788 F.Supp. at 1518.

State law does not govern this case, however. Rather, the terms of the compact control. S.Rep. No. 446, 100th Cong.2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76 ("[U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities."). Under the Cabazon and Sycuan Compacts, if the Bands prevail in this litigation, the State is required to pay them the amount of the license fee that the State receives from the racing associations based on wagers at Indian facilities. If the Bands lose, however, they will be deprived of this amount, which will go to the State. Contrary to the conclusion of the district court, the Bands do indeed have a "right" to the unpaid fees. The licensing scheme currently imposed thus constitutes an economic burden.

In assessing the Bands' interests, we also must consider the nature of the taxed activity. *Cf. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20, 107

S.Ct. 1083, 1093-94, 94 L.Ed.2d 244 (1987) (state regulation of on-reservation bingo games preempted because tribe was generating value on reservation); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155, 100 S.Ct. 2069, 2082, 65 L.Ed.2d 10 (1980) (upholding state tax on on-reservation sales of cigarettes to non-Indians because value of transaction was "not generated on the reservations by activities in which the Tribes have a significant interest"). "That a tribe plays an active role in generating activities of value on its reservation gives it a strong interest in maintaining those activities free from state interference." *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1410 (9th Cir.1992).

Although recognizing the Bands' "commitment to operation of their gaming operations," the district court found that the value of the Bands' activity was derived from live horse racing, an activity "occurring outside the reservation and operated by non-Indian racing associations." *Cabazon Band*, 788 F.Supp. at 1521. Consequently, the court concluded, "[b]ecause the betting occurs on Indian land, but is dependent on events occurring elsewhere, this factor is neutral in balancing tribal, state, and federal interests." *Id.*

The district court has mischaracterized the Bands' interest, in our view. In this instance, the Bands have invested significant funds and effort to construct and to operate wagering facilities and to attract patrons. It is not necessary, as the district court appears to posit, that the entire value of the on-reservation activity come from within the reservation's borders. It is sufficient that the Bands have made a substantial investment in the gaming operations and are not merely serving as a conduit for the

products of others. *Cabazon*, 480 U.S. at 219, 107 S.Ct. at 1093 ("Here . . . the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians.").

C

In contrast to the federal and tribal interests articulated above, the State's interests are weaker, although certainly not trivial. As the district court recognized, the State of California has an extensive regulatory scheme for offtrack betting and expends funds to regulate this activity. Thus, "[t]his is not a case in which the State has nothing to do with the on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 186, 109 S.Ct. at 1713.

The State's asserted interest is weakened in this case, however, because IGRA specifically recognizes such state regulation and establishes a mechanism – the compacts – by which Bands can reimburse the State for regulatory costs, outside of the State tax structure. Indeed, the Cabazon and Sycuan Compacts expressly provide for the modification of the compacts to allow for such reimbursement in the event that the Bands prevail in this action. Thus, the State's interest can be satisfied without imposition of the license fee.

Furthermore, this court has required that the State demonstrate a close relationship between the tax imposed on the on-reservation activity and the state interest asserted to justify such tax. *See Crow Tribe*, 819 F.2d at 901 (concluding that a state tax was not narrowly tailored to serve state interest of paying for government services associated with production of coal because 19 to 30% of

the tax went to the state general fund). Here, there is no narrow tailoring since California does not use the license fee revenues to fund services related to the regulation of offtrack betting. Rather, 100% of the license fee earned from Indian wagering goes into the State General Fund. This suggests a "distant, rather than a carefully tailored, relationship" between the license fee revenue and the regulatory services provided thereunder.[2] *Id.*

The express objectives of IGRA, when combined with the Bands' interests, preclude the application of the State's license fee.

IV

We conclude that IGRA preempts the State of California from taxing offtrack betting activities on tribal lands. Accordingly, the district court's grant of summary judgment is reversed and remanded with instructions to enter summary judgment for the Bands.

REVERSED and REMANDED with instructions.

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[2] Congress specifically recognized the raising of revenue as a legitimate state interest with respect to Class III gaming. *See* S.Rep. No. 446, 100th Cong.2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083. This interest must be informed by the congressional intent that the Bands be the primary beneficiaries of such gaming, however.

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No. 97-1608

In the
Supreme Court of the United States
October Term, 1997

PETE WILSON, GOVERNOR OF THE STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

CABAZON BAND OF MISSION INDIANS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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34 pp

QUESTIONS PRESENTED

1. Do federal courts have jurisdiction to determine the scope of state authority to tax on-reservation gaming activities at tribal facilities conducted pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et. seq.*?

2. Should this Court hear and decide a Tenth Amendment claim that was not timely presented to, or decided by, the court of appeals?

3. Was the court of appeals correct in holding that 25 U.S.C. §2710(d)(7)(A)(ii) includes no implied right of action permitting states to initiate enforcement actions against allegedly unlawful tribal gaming activities that are not the subject of a tribal-state compact?

PARTIES TO THE PROCEEDING

The Petition to which this Brief in Opposition is addressed (Case No. 97-1608) lists Southern California Off-Track Wagering, Inc. (SCOTWINC) and six racing associations—Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course and Los Angeles County Fair—as respondents, either in the caption or in the "Listing of Parties to the Proceedings," at page ii.

This Brief in Opposition is filed on behalf of the Cabazon, Sycuan. Barona and Viejas Bands of Mission Indians, the appellants below and the respondents in this Court. These four respondents do not believe that SCOTWINC and the six racing associations are respondents in this proceeding. SCOTWINC and the six racing associations were unsuccessful intervenors below and are, in fact, petitioners before this Court in case No. 97-1636.

The parties to Case No. 97-1608 are as follows:

Petitioners:

Pete Wilson, Governor of the State of California
State of California
California Horse Racing Board

Respondents:

Cabazon Band of Mission Indians
Sycuan Band of Mission Indians
Barona Band of Mission Indians
Viejas Band of Mission Indians.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

ADDITIONAL PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 11

A. Federal Courts Have Jurisdiction Under 28 U.S.C. §1362 To Determine The Scope of State Authority To Tax On-Reservation Activities. 11

B. The State Clearly Consented To Suit In Federal Court 16

C. The State Has Significantly Misrepresented The Lower Courts Decisions Regarding IGRA's "Primary Beneficiary" Policy and Suggested To This Court A Conflict That Does Not Exist 17

D. The State's Tenth Amendment Claim Was Not Raised or Decided In The Court Below. 19

E. The State's "Implied Covenant" Argument Was Properly Rejected By The Court of Appeals 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Cabazon Band of Mission Indians v. Wilson, 788 F.Supp. 1513 (E.D.Cal.1992) 1, 5

Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir., 1994) 6

Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050 (1997) 9

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 3

Cardinale v. Louisiana, 394 U.S. 437 (1969) 19

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) 14

Department of Taxation & Finance of New York v. Milhelm Attea & Bros. Inc., ___ U.S. ___, 114 S.Ct. 2028 (1994). 15

Duignan v. United States, 274 U.S. 195 (1927) 19

Forest County Potawatomi Tribe v. Norquist, 45 F.3d 1079 (7th Cir. 1995) 13

Gully v. First National Bank, 299 U.S. 109 (1936). 13

In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996) 9

Jaffke v. Dunham, 352 U.S. 280 (1957) 15

Kimball v. Callahan, 590 F.2d 268 (9th Cir. 1974).....9

Lawn v. United States, 355 U.S. 339 (1958).....19

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).....14

Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986).....13

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976).....14

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985).....14

New York v. United States, 505 U.S. 144 (1992).....20

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995).....14

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991).....14

Powell v. McCormack, 395 U.S. 486 (1969).....15

Printz v. United States, ____ U.S. _____, 117 S.Ct. 2365 (1997).....21

Sycuan Band of Mission Indians v. Roache, 54 F.3d. 535 (9th Cir. 1995).....21

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992),.....19

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).....14

Youakim v. Miller, 425 U.S. 231 (1976) 19

Statutes

Indian Gaming Regulatory Act,
25 U.S.C. §2701 et. seq ..... i, 3

25 U.S.C. §2701(1) 3

25 U.S.C. § 2710(b)(2)(B) 7

25 U.S.C. § 2710(d)(3)(B). 12

25 U.S.C. § 2710(d)(4). 3

25 U.S.C. § 2710(d)(7)(A)(ii) i

25 U.S.C. § 2710(d)(7)(B)(iii)(II). 3

28 U.S.C. § 1362 ..... 13, 14

28 U.S. C.§ 2202 ..... 8, 15

California Business & Professions Code §§ 19611-
19612.6 4

STATEMENT OF THE CASE

The central issue in this case is whether the State of California will be required to live up to the agreements that it negotiated with the respondent Indian tribes nearly eight years ago. Simply put, the State[1] agreed in gaming compacts with the Tribes to turn over license fees it collected from wagers placed at the Tribes' off-track betting facilities if the fees were held to be impermissible by a federal court. The Ninth Circuit Court of Appeals has now held twice that, under well-established principles of federal Indian law, the fees are impermissible.[2] The State's current petition for writ of certiorari is therefore nothing more than a last ditch effort to avoid complying with the deal that it struck with the Tribes in 1990.

This case does not involve issues that warrant review by this Court. The State of California has refused to negotiate or execute any other compacts authorizing off-track wagering, so no future compact will ever resemble the four compacts at issue in this case. As a result, no other federal court is likely to be faced with the issues addressed in this case and, while the underlying issues in dispute involve federal questions, these federal questions have been resolved by the court of appeals in accordance with well established principles of federal Indian law as handed down by this Court.

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[1] As used herein, "State" refers to the State of California, Governor Wilson and the California Horse Racing Board, the defendants in the district court action and petitioners here.

[2] The State did not seek this Court's review of the Ninth Circuit's first decision, which is reported at 37 F.3d 430 (9th Cir. 1994) and which is referred to by that Court, and by the State in its petition, as "Cabazon II." "Cabazon I" is the original district court decision that was reversed by the Ninth Circuit in 1994, and which is reported at 788 F.Supp. 1513 (E.D. Cal.1992).

In an attempt to convince the Court otherwise, the State has overlaid layers of needless complexity onto a relatively straightforward Indian tax controversy. The State has clouded issues and re-invented the history of this case, hoping that this Court will reconsider the most recent court of appeals' decision that held the State to its word. The State seeks to avoid having to pay the Tribes money to which the Tribes are legally entitled under clear and unambiguous agreements and is asking this Court to re-write well established principles of federal Indian law in order to relieve the State of its obligation to the Tribes.

Although this case may have originated as a dispute about the respective taxing authority of the Tribes and the State, and no matter how the State may attempt to characterize it otherwise, at this point this appeal is about nothing more than money. More precisely, this appeal is about whether the State will be able to retain a large fund of money that has accumulated while the State and four federally-recognized Indian tribes have litigated their respective entitlements to those funds.[3] Despite the State's desperate attempt to shift the focus, the essential nature of this case at this point is the disposition of this fund, to which the court of appeals has already twice held the Tribes are entitled.

The genesis of the present controversy stems from the inability in 1990 of the original plaintiff tribes to reach agreement with the State on a jurisdictional issue

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[3] The four tribes are the Cabazon and Sycuan Bands of Mission Indians, who filed the original action in 1990 (hereinafter referred to as the "original plaintiff tribes," and the Barona and Viejas Bands of Mission Indians who intervened in mid-1996, making claims identical to those of the original plaintiff tribes. Together, the four tribes will be referred to herein as the "Tribes."

in the course of negotiating compacts with the State under which those tribes would conduct off-track wagering on horse races, also known as simulcast wagering.[4]

The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701, et seq., (hereinafter, "IGRA") authorizes tribes and states to negotiate and enter into such compacts on the subject of how such a tribe in such a state may engage in forms of class III gaming on its Indian lands.[5] The compacting process under IGRA is a unique arrangement devised by Congress for multiple purposes, one of which is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2701(1). However, under IGRA, one principle is clear: a state may not attempt to tax or otherwise profit from tribal governmental gaming under such a compact, beyond being reimbursed for its actual and reasonable costs of regulation. *See* 25 U.S.C. § 2710(d)(4). Even a request for such state taxation is *per se* an act of bad faith bargaining. 25 U.S.C. § 2710(d)(7)(B)(iii)(II).

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[4] California allows live on-site wagering on horse races both at race tracks where the race is being run, and off-track wagering at other locations which are linked to the live race by the instantaneous electronic transmission of the audio and visual race signals from the live track to these remote "satellite" locations. The arrangement is known as "simulcast" racing and wagering at remote "simulcast" facilities. Wagers placed at both the live location and these simulcast facilities are placed into a single parimutuel pool, and winners are paid at all locations from this pool.

[5] Congress enacted IGRA at least in partial response to this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), holding that the State could not prohibit or regulate the Cabazon Band's on-reservation gaming activities.

When the original plaintiff tribes were negotiating with the State on the subject of tribal operation of simulcast wagering facilities on their reservations, as described above, agreement was reached on all points but one. In general, the State and the original plaintiff tribes agreed to adopt the same state statutory scheme for allocating and distributing the total amount wagered (known as the "handle") as applied to non-tribal simulcast facilities. This statutory scheme allocates 83% of the handle back to winning bettors and smaller, stated percentages[6] of the remainder (known as the "takeout") to a variety of participants in the racing industry, including local governments, pension funds, purses, commissions, breeder and stallion awards, equine research, satellite wagering facilities and, finally, to the State as a "license fee."[7]

The one point on which the State and those two tribes could not agree was whether the State's collection of the license fee on wagers placed at tribal simulcast facilities was permissible under IGRA. That fee varies from 1.5%-4% of the handle, depending on the breed of the horse, the type and location of a particular race and other factors. *See* B&P Code §§ 19611-19612.6.

Rather than allow an impasse on this issue to obstruct the compact negotiation process, the original plaintiff tribes and the State agreed in their respective compacts that the question would be resolved through federal court litigation, to which the State expressly consented. Paragraph 19 of each compact provided that, if the final judgment in the agreed-upon litigation held

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[6] See California Business & Professions Code (hereinafter "B&P Code") §§ 19605.7, *et seq.*, for the entire complex allocation scheme.

[7] Although designated as a license fee, all parties to this case agree that this "fee" is a tax.

that the fee was permissible under federal law, the State would retain the funds and would be permitted to continue collecting them without additional reimbursement for regulatory expenses. On the other hand, the compact was equally clear that if the state license fee was determined to be impermissible in such a final judgment, the State would pay the accumulated disputed funds from its treasury over to the tribes for the period up to entry of final judgment (less reimbursement for the State's actual regulatory costs), and thereafter the disputed funds would be distributed directly to the tribes for the duration of the compacts. [8]

The actual language of paragraph 19 of the Cabazon Band's compact is reproduced in full in the Appendix to this brief.[9] The relevant language, however, is found in paragraph 19(B)3, which provides in pertinent part:

> In the event a final judgment is obtained that the deduction and distribution of the state license fee is impermissible under the Act, and following the exhaustion of all appellate review, ***the State shall pay over to Cabazon the amount of all state license fees previously distributed to the State***

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[8] The record in this case demonstrates that the State's actual regulatory expenses are miniscule. During the first year of operation of the Cabazon facility and the first six months of operation of the Sycuan facility, the State incurred total regulatory costs for both tribal facilities of less than $23,000. During the same period, the State collected approximately $740,000 in license fees on wagers placed at those two facilities. *Cabazon Band of Mission Indians v. Wilson,* 788 F.Supp. 1513, 1515-16 (E.D.Cal.1992)

[9] Identical or equivalent language appears on the compacts of each of the four respondent tribes.

> ***under this compact*** exclusive of assessments due and owing under subparagraph 4, below, ***and Cabazon shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Cabazon simulcast wagering facility.***

(Emphasis added)

This negotiated compact language is simple and clear. Depending on the final outcome of the agreed-upon litigation, either the State would keep the disputed funds itself, or it would pay to the Tribes both the money that had accumulated prior to final judgment, and the money that thereafter otherwise would be deducted and distributed to the State as long as the compacts remained in effect.

In October of 1994, the Ninth Circuit Court of Appeals ruled in favor of the original plaintiff tribes, holding that the State's collection of the license fee from on-reservation wagers was preempted by IGRA, that the tribes were entitled to the license fees and remanding the case to the district court with instructions to enter summary judgment for the Tribes.[10] Certiorari was not sought, so the Ninth Circuit's decision became final in January of 1995. The Tribes have been trying to enforce that judgment and collect their money ever since.

The amount at stake is large and growing larger by the day. The accumulated state license fees for all four respondent Tribes was approximately $14 million as of January 15, 1998, and the State is collecting additional

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[10] *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir., 1994).

license fees during the pendency of this appeal. Because of the State's intransigence and delaying tactics, the Tribes have been and continue to be deprived of funds with which they would provide the governmental services and programs that IGRA directs shall be funded with tribal gaming revenues.[11]

When the State did not seek review by this Court of the 1994 ruling, the case was remanded to the district court for what the Tribes anticipated would be a routine entry of judgment in their favor. But that is not what happened. Instead, by letter dated May 31, 1995, the State informed the respondent Tribes that the Ninth Circuit's 1994 decision rendered their four compacts *invalid*, and that therefore the State would discontinue the simulcast signal as of July 1, 1995. To prevent the loss of the simulcast signal (without which no simulcast facility can operate), the original plaintiffs, the Cabazon and Sycuan Bands, filed motions for a temporary restraining order, and the Barona and Viejas Bands of Mission Indians filed complaints in intervention and similar motions. By its Order of June 30, 1995, the district court granted intervention and the temporary restraining order. However, on July 12, 1995 the district court issued a further order directing not the entry of judgment in favor of the Tribes as the Court of Appeals had directed, but rather requiring that the Tribes file amended complaints and complaints in intervention seeking recovery of the disputed funds. In doing so, the district court rejected the motion of the Tribes for further

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[11] IGRA requires that a tribe devote its net gaming revenues only "(i) to fund tribal governmental operations or programs, (ii) to promote the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; and (v) to help fund operations of local governmental agencies. 25 U.S.C. § 2710(b)(2)(B).

relief under 28 U.S.C. § 2202, namely, the entry of judgment in favor of the tribes for the payment of the accrued and future state license fees, as directed by the court of appeals. In its order, the district court acknowledged that the State would then be able to assert various defenses to the Tribes' amended complaints and complaints in intervention, and to assert counterclaims against the Tribes.

The Tribes objected to having effectively to start their litigation over by filing amended complaints and complaints in intervention, and instead argued that all that was needed after the Ninth Circuit's explicit remand order was entry of judgment by way of their motion for further relief under 28 U.S.C. § 2202. However, the district court disagreed.

To test whether such a new phase of the litigation was proper, the Tribes filed a petition for a writ of mandamus with the court of appeals, requesting that the district court be directed to follow the court of appeals' remand order, rather than requiring the Tribes to file amended complaints and complaints in intervention aimed at recovering the disputed funds. By Order of December 8, 1995, the court of appeals denied the petition for a writ of mandamus, holding that, because relief by appeal was available, use of the extraordinary writ was unnecessary.

Having no other choice, the four Tribes filed their amended complaints and complaints in intervention, seeking the same disputed state license fees as had been the original object of this case in 1990. The State filed its answers, asserting several affirmative defenses and counterclaims. The Tribes moved to strike the affirmative defenses and to dismiss the counterclaims. The district court granted these motions in full by its

Memorandum of Opinion and Order of April 26, 1996, which also directed the State to "report to the Court within 14 days as to how it will comply with the compacts in light of the ruling by the Court of Appeals." The State never submitted such a report; instead it filed a motion for reconsideration.[12] By its Memorandum of Decision and Order of July 19, 1996, the district court denied the State's motion for reconsideration and directed that "within 14 days of this order the State shall pay over to the tribes the monies that have been assessed as a license fee on pari-mutuel off-track wagering at the plaintiffs' simulcast facilities. . . . The court will not stay this order."[13]

The State appealed from the district court's judgment and, in *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (1997), the court of appeals rejected each of the State's arguments, finding them to be inconsistent with, or foreclosed by its earlier 1994 *Cabazon II* decision.[14] First, the court of appeals held

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[12] Shortly before the hearing on this motion, the various racing associations and SCOTWINC (the simulcast organization) petitioned for leave to intervene, claiming that if the State could not collect the disputed license fees, the accumulated funds should go to them. That petition was denied by the district court as untimely, the Ninth Circuit affirmed, and the would-be intervenors have now filed a separate petition for certiorari in this Court. *See* No. 97-1636.

[13] The parties subsequently agreed that while the State would not be required to pay the disputed funds over to the Tribes until all appeals were exhausted, the State would deposit the monies into a special segregated state fund, where they are today.

[14] Under the Ninth Circuit's "law of the case" doctrine, one panel of the court will not as a general rule reconsider questions that another panel has previously decided in the same case. *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996); *Kimball v. Callahan*, 590 F.2d 268 (9th Cir. 1974). Therefore, the panel was clearly correct in its most recent decision in noting that "[o]ur decision in

that the State expressly consented to suit in federal court in the compacts and, thus, waived its Eleventh Amendment immunity. 124 F.3d at 1057.

Second, the court of appeals held that the State could not properly introduce extrinsic evidence in support of an interpretation of the compact that is "contrary to its plain and unambiguous language." *Id.* at 1057. The Court reasoned that extrinsic evidence offered by the State was merely an attempt to "escape the natural consequences of [its] Cabazon II decision." *Id.* In the words of the court of appeals, "[w]e will not entertain strained interpretations of a clear and unambiguous compact provision. Instead, we hold the State to its word." *Id.* at 1058.

Third, the court of appeals held that the State misconstrued its analysis in its 1994 *Cabazon II* decision regarding the primary beneficiaries of gaming revenue. As discussed below, that federal policy seeks to ensure that tribes, rather than States, should be the primary beneficiaries of tribal gaming operations. This policy was threatened by the State's imposition of the tax at issue, but it was in no way threatened by the fact that the Tribes had agreed in their compacts to adopt the other parts of the State's standard wager distribution system. *Id.* at 1058-59.[15]

Finally, the court of appeals rejected the State's argument that the compacts were unenforceable because the tribes were purportedly conducting unlawful gaming

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Cabazon II is central to the resolution of the instant dispute, and it limits the task before us." 124 F.3d at 1054.

[15] The fees paid to others under that system compensate the participants for services that are directly or indirectly rendered to the racing industry as a whole, and thus benefit the Tribes as well.

activities not authorized by the compacts. The plain language of IGRA foreclosed any such contention. As the court of appeals noted, "[o]utside the express provisions of a compact, the enforcement of IGRA's prohibitions on class III gaming remains the exclusive province of the federal government." *Id.*

This case was never intended to be, and in reality is not, terribly complicated. If the issues have become somewhat obscure, that is caused by the dust cloud thrown up by the State as it thrashes about seeking to avoid living up to its negotiated agreements with the Tribes. For the reasons set forth below, the Court should deny the petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

A. Federal Courts Have Jurisdiction Under 28 U.S.C. §1362 To Determine The Scope of State Authority To Tax On-Reservation Activities.

The petitioners' assertion that the courts below did not have jurisdiction over this case does not warrant review by this Court. The lower courts correctly applied settled law in determining that they had federal question jurisdiction to grant the relief requested.

The State concedes that the district court initially exercised proper jurisdiction over this case, yet contends that the district court somehow lost such jurisdiction after the court of appeals made its initial ruling in favor of the Tribes in October, 1994. In the 1994 decision, the court of appeals held that the original plaintiff tribes were entitled to the license fees at issue and remanded the case to the district court with instructions to enter summary judgment for the Tribes. At that point, the State claims that the district court's jurisdiction disappeared because

this case became a purely contractual arrangement that "happen[s] to be incorporated into tribal-state compacts." *State's Petition* at 13. This argument is without merit.

This case remains what it has always been: a dispute about whether the State can lawfully impose its license fees on wagers placed at the Tribes' off-track wagering facilities under federal law. While the compacts negotiated by the State and the Tribes certainly are binding agreements, this case is no "run-of-the-mill contract" enforcement case. 124 F.3d at 1055. The court of appeals rejected the State's argument to that effect, recognizing that "this claim is not based on a contract that stands independent of the Compacts." *Id.* The compacts were made pursuant to federal law, and were approved by the Secretary of the Interior, as required under IGRA. 25 U.S.C. §2710(d)(3)(B). The dispute over state taxing authority at the heart of this case is a dispute that arose under the provisions of IGRA and is therefore grounded on principles of federal Indian law.

The State contends that the central question in this case somehow changed when the State unilaterally declared the compacts to be invalid following the 1994 court of appeals decision. Such an argument flies in the face of reason, as well as the factual record. The issues involved in this case could not change simply through a unilateral declaration by the State that the *Cabazon II* decision in favor of the Tribes somehow invalidated the Tribal-State compacts; a position that the district court immediately rejected. The State's argument on this point, as well as its tactics throughout this case, amount to nothing more than a smoke-screen thrown up in an attempt to cloud the issues and allow the State to avoid complying with the agreement it struck with the Tribes.

The court of appeals found two alternative grounds on which it could exercise federal question jurisdiction over this case. First, the court found that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." *Id.* at 1056. This case involves important federal interests codified in IGRA – interests that in and of themselves give rise to federal question jurisdiction. *See Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 814 n. 12 (1986); *see also Forest County Potawatomi Tribe v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995) (tribal suit to enforce rights under IGRA agreement involved federal question). Under IGRA, Congress gave Tribes the right to conduct Class III gaming pursuant to negotiated compacts, and outlined the rights Tribes and States could have under those agreements. This case has established and enforced these federal rights and, as this Court has stated, "the federal nature of the right to be established is decisive" of whether the action arises under federal law. *Gully v. First National Bank*, 99 U.S. 109, 116 (1936). Under this test, the present action clearly arises under federal law.

Second, the court of appeals also found that "[t]he Bands' cause of action arises under the laws of the United States" because "[t]he Bands sue to recover money taken by the State in violation of federal law." 124 F.3d at 1056. This statement of law is in perfect harmony with this Court's prior Indian tax case decisions.

This case is indistinguishable from a long line of federal cases that have determined the scope of state authority to tax on-reservation activities. In 1976, this Court carefully considered whether federal courts have jurisdiction over suits to restrain state taxing authority

asserted against Indian tribes and found that such jurisdiction is based on 28 U.S.C. §1362, which provides "that district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473-74 (1976). This Court has also clearly held that "a suit by an Indian tribe to enjoin the enforcement of state tax laws is cognizable in the district court under §1362..." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 762 n.2 (1985), and has repeatedly recognized federal question jurisdiction over disputes regarding the scope of state taxing authority over on-reservation activities. *See e.g., Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

Here, as the court of appeals recognized, federal jurisdiction arises because four Indian tribes seek to enjoin the State from imposing a tax that is pre-empted by federal law. Questions surrounding the scope of state authority to tax on-reservation activities are federal questions. In particular, this Court has recognized that the doctrine of federal preemption, as employed by the Ninth Circuit in this case, is the analytical tool by which such questions are resolved. "Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." *McClanahan v. Arizona State Tax*

Commission, 411 U.S. 164, 172 (1973). *See also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989); *Department of Taxation & Finance of New York v. Milhelm Attea & Bros. Inc.*, ___ U.S. ___, 114 S.Ct. 2028, 2035 (1994). Thus, the district court clearly had jurisdiction over this case, and the State's suggestion to the contrary runs counter to the most basic principles of federal Indian law announced by this Court.

In addition, there is a third basis for sustaining jurisdiction in this case. All parties, including the State, agree that the district court had jurisdiction to adjudicate the Tribes' original action for declaratory judgment. That being the case, the court necessarily had jurisdiction under 28 U.S. C. §2202 to enter such further orders as were necessary to give complete and effective relief consistent with its declaratory judgment. *Powell v. McCormack*, 395 U.S. 486, 498 (1969). Although the district court allowed the case on remand to become more complex than necessary, the order eventually entered by the district court could and should have been entered in response to the Tribes' motion for further relief under 28 U.S.C. §2202, a motion over which the court plainly had jurisdiction and under which it did grant the Tribes some limited relief.[16] Because this Court can affirm on any ground presented, whether or not relied upon by the lower courts, *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957), this Court should deny the writ on the basis that the lower courts properly exercised jurisdiction over this case. The State presents no substantial federal question regarding either the merits of the federal

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[16] In its Memorandum of Opinion and Order of July 12, 1995, the district court held that under §2202 it could enjoin the State from unilaterally declaring the compacts invalid and cutting off the satellite signal to the Tribe's gaming facilities. *See* Appendix to Petition at App. 6, App. 18-21.

preemption of the state tax at issue in this case, or of the jurisdiction of the federal courts to determine that issue.

B. **The State Clearly Consented To Suit In Federal Court.**

The State next seeks to invoke an Eleventh Amendment defense that plainly contradicts its own clear, unambiguous, express consent to suit in federal court. This attempt to rewrite the factual history of the case does not warrant review by this Court.

The State claims in its petition that it consented to this action in federal court up until the court of appeals made its initial ruling in favor of the Tribes in October 1994. At that point, the State claims that it no longer consented to suit. *State's Petition* at 14. Put another way, the State's position is that it consented to suit only so long as the court might find in its favor. This puzzling claim is at odds with the undisputed facts of this case.

As the court of appeals explained:

> [i]n Paragraph 19, the State expressly agreed that the Bands 'shall seek a declaratory judgment against the State from a United States district court of competent jurisdiction as to whether the deduction and distribution of the state license fee . . . are permissible under the Act.' *Moreover, in paragraph 19, the State not only consented to the suit, but it also agreed to the remedy.*

124 F.3d at 1057. (Emphasis added). Paragraph 19(b) of the Compacts, in which the State expressly agreed to turn over the monies in the event the Tribes won the litigation, clearly

demonstrates that the court of appeals was correct in this conclusion.

Further, the court of appeals found that the State's waiver of immunity to suit in federal court extends to all actions under the Compact, pursuant to Paragraph 18 of the Compact. *Id.* at 1057.

Thus, the State expressly waived its immunity under paragraph 19 with regard to the complete adjudication of the license fee dispute and further waived its immunity under the more general provisions of the Compact regarding judicial review. As a result, there is no merit to the State's makeweight Eleventh Amendment claim, and the court of appeals properly rejected it.

C. The State Has Significantly Misrepresented The Lower Courts Decisions Regarding IGRA's "Primary Beneficiary" Policy and Suggested To This Court A Conflict That Does Not Exist.

The State next alleges that the lower courts "cannot come to a consistent position respecting the application of IGRA's 'primary beneficiary' policy to the facts of this case." *State's Petition* at 16. The claim that there is a conflict rests solely on the state's misunderstanding of the lower courts' decisions in this case.

According to the State, the Compacts are purportedly invalid because the Tribes receive a fraction of the total wagering revenue while other participants in the racing industry collectively receive a larger percentage of the total amount wagered. Contrary to the State's argument, however, the wager distribution system had nothing to do with the question of whether the State

can lawfully impose its license fees on reservation gaming activities. As the court of appeals explained, the State misconstrued the analysis in its *Cabazon II* decision regarding the primary beneficiaries of gaming revenue. 124 F.3d at 1058.

The court of appeals in *Cabazon II* did not announce a new test that bars any tribal-state compact under which any entity receives more revenue from gaming than is received by the Tribes. Rather, the court of appeals considered the federal interest in ensuring that tribes are primary beneficiaries of Indian gaming only as one part of a larger balancing test, pursuant to well-established federal Indian law, and concluded on that basis that the license fees are impermissible. *Id.* At 1058.

There is no support in law or logic for the State's contention that the compacts are invalid merely because the Tribes agreed to incorporate into the compacts much of the State's standard wager distribution system. The wager distribution system had nothing to do with the central issue of whether the State can lawfully impose its license fees on reservation gaming activities.

The State goes to great lengths in its petition to suggest that the court of appeals most recent decision "effectively nullifies the holding of Cabazon II." *State's Petition* at 17. As the court of appeals explained, however, the State fundamentally misunderstands the Cabazon II holding regarding the federal interest in ensuring that tribes are the primary beneficiaries of gaming operations. 124 F.3d at 1058-59. As the court of appeals clearly determined, this policy is threatened by the State's imposition of the tax at issue, not by the fact that the Tribes have generally agreed to comply with other portions of the State's standard wager distribution system.

Here again, the State has tried to create a nonexistent issue in order to convince this Court that something in this case merits review. There is no split of authorities regarding this purported issue, and the Ninth Circuit's decisions in *Cabazon II* and *Cabazon III* are entirely consistent. The court of appeals properly considered the federal primary beneficiary policy as articulated in IGRA in accordance with well established principles of federal Indian law. Thus, this issue, like the others discussed above, does not merit review by this Court.

D. **The State's Tenth Amendment Claim Was Not Raised or Decided In The Court Below.**

The State further contends that the court of appeals decision has the effect of "diverting state tax revenues to the Tribes" in violation of the Tenth Amendment. *State's Petition* at 20. This claim is both incorrect and not properly presented here.

The State's Tenth Amendment claim is not properly at issue in this case. It has been long established that this Court reviews only those questions that were properly raised by the parties in the courts below. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). The Court follows this rule because "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Further, "allowing the able counsel who argue before [this Court] to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646

(1992). *See also, Duignan v. United States*, 274 U.S. 195, 200 (1927); *Lawn v. United States*, 355 U.S. 339, 361 (1958).

The State did not raise the purported Tenth Amendment issue in either its opening brief or reply brief to the court of appeals. Accordingly, the court of appeals did not rule on the issue. The issue was raised for the first time in the State's petition to the court of appeals for rehearing, which was denied. Because it was not timely raised or decided by the courts below, this Court should not now entertain the purported Tenth Amendment issue.

Even if this argument were properly before the Court, however, the State's position is clearly erroneous. The State is not being required to "tax the racing industry for the benefit of the Respondent Tribes," as the State contends. *State's Petition* at 20. Rather, the Tribes merely seek that the State be precluded from collecting license fees from on-reservation wagers in violation of IGRA and well established principles of federal Indian law, and that the State further be required to live up to the explicit bargain that it presumably negotiated with the Tribes in good faith in 1990.

The State's power to tax the racing industry will be unimpeded by the decision handed down by the lower courts in this case. California tax statutes and collections will operate exactly the same after the Ninth Circuit's order is enforced. No other racing industry participant will be affected, because under paragraph 19(A) of the compacts, the State and the Tribes so agreed. The only difference will be that the amount of the state license fee from on-reservation wagers will be paid over to the Tribes, just as the State expressly agreed under Paragraph 19 (B) 3 of the compacts. The balance of the takeout will still be distributed as provided under

the State's statutory scheme.

As is readily apparent, this case is unrelated to recent Tenth Amendment cases upon which the State seeks to rely. In those cases, the federal government violated the Tenth Amendment by compelling States to dispose of radioactive waste, *New York v. United States*, 505 U.S. 144, 149 (1992), and by commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers, *Printz v. United States*, ____ U.S. _____, 117 S.Ct. 2365 (1997). In this case, by contrast, the United States does not commandeer any state agency to perform a federal regulatory function. Instead, the Tribes seek nothing more from the State than its compliance with the negotiated agreement that it signed with each of the Tribes. Thus, the Tenth Amendment is simply not implicated in this case.

E. The State's "Implied Covenant" Argument Was Properly Rejected By The Court of Appeals.

The State has seriously misrepresented the court of appeals' decision on this issue. The State claims that the court of appeals held that "Indian tribes have no obligation to comply with IGRA's prohibition against uncompacted class III gaming. . . unless they expressly agree to do so." *State's Petition* at 20-21. The court of appeals made no such holding. Rather, it correctly held that the enforcement of IGRA beyond the scope of negotiated Tribal-State Compacts is the exclusive province of the federal government, citing *Sycuan Band of Mission Indians v. Roache*, 54 F.3d. 535, 538 (9th Cir. 1995). As IGRA makes clear, and as *Sycuan* reaffirmed, the State has no jurisdiction over tribal gaming activities that are not included in a tribal-state compact; these

activities are subject to exclusive federal enforcement efforts.

Both the court of appeals and the district court found that the State's "implied covenant" argument was foreclosed by the plain statutory language of IGRA. 25 U.S.C. §2710(d)(7)(A)(ii) authorizes a state to seek an injunction in federal court, but only if the tribal gaming activities sought to be enjoined are "conducted in violation of any Tribal-State compact." Where, as here, the alleged tribal activities are not the subject of a compact, Congress intended that any enforcement efforts would be solely within the jurisdiction of the federal government, and the states would have no "implied" enforcement authority under IGRA under those circumstances.

The court of appeals unmasked the State's argument about a purported "implied covenant" and found it to be just another attempt by the State to co-opt federal power by asserting jurisdiction over gaming activities that are not the subject of a Tribal-State compact. 124 F.3d at 1059-60. The court of appeals settled this issue in accordance with the plain language of IGRA. Thus, this issue does not warrant review by this Court.

CONCLUSION

For all the reasons set forth above, the petition should be denied.

Respectfully submitted,

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APPENDIX

Paragraph 19, Cabazon Compact

19. Distribution of Handle

(A) Generally. Subject to subsections (B) and (C) below, the amounts deducted from parimutuel wagers at the Cabazon simulcast wagering facility, and the distribution of such amounts, shall be the same as that provided for under state law for simulcast wagering facilities, other than fairs, in the southern zone.

(B) State License Fee.

1. Cabazon shall seek a declaratory judgment against the State from a United States District Court of competent jurisdiction as to whether the deduction and distribution of the state license fee under Business and Professions Code Section 19596.6, subdivisions (d)(1), (d)(2), (k), and (l), are permissible under the Act.

2. In the event a final judgment is obtained that the deduction and distribution of the state license fee is permissible under the Act, and following the exhaustion of all appellate review, the State shall retain all license fees previously distributed to it, and shall be entitled to collect the state license fee from all wagers at the Cabazon simulcast wagering facility. Under such circumstances, the State shall not be entitled to any further assessment against or payment from Cabazon to cover the costs of State regulation of the Cabazon simulcast wagering facility, and the Cabazon simulcast wagering facility shall be entitled to all benefits and to participate in all programs under

applicable state law which are available to any simulcast wagering facility, other than a fair, in the southern zone.

3. In the event a final judgment is obtained that the deduction and distribution of the state license fee is impermissible under the Act, and following the exhaustion of all appellate review, the State shall pay over to Cabazon the amount of all state license fees previously distributed to the State under this Compact exclusive of assessments due and owing under subparagraph 4, below, and Cabazon shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Cabazon simulcast wagering facility. The amount of state license fee previously distributed to the State and not reasonably claimed by the State as due and owing from the commencement of operation of the facility shall be paid over to Cabazon as soon as practicable and in any event, not later than sixty (60) days following final judgment.

4. If it is judicially determined that the State is not entitled to receive the state license fee, the parties, in accordance with paragraph 11(B), shall modify this Compact to provide for assessment by the State of the actual costs incurred by it in regulating the Cabazon simulcast wagering facility and for the settlement and collection of such costs due and owing from the commencement of operation of the facility.

(C) Additional Provisions.

1. Cabazon and the simulcast organization may agree between them and incorporate into the agreement described in Paragraph 8, above, how the one percent (1%) of the handle designated for promotion of the program at the Cabazon simulcast wagering facility shall be distributed and expended; and

2. Cabazon shall be deemed to be the equivalent of the city or county entitled to the 0.33% of the handle distributed to the local government within which the simulcast wagering facility is located, and Cabazon shall receive such distribution.